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ABSTRACT

This guide is a supplement to the 1996 edition of "Texas School Law: A Practical Guide." It addresses four topics: real-estate issues relating to school districts and colleges, student-discipline law, education of children with disabilities, and sexual abuse or harassment of students. The first section examines legal changes in the realm of property sales, purchase of real property, and condemnation. Section two discusses Chapter 37, which stipulates that the board of trustees of each school district must adopt a code of student conduct with the advice of its district-level committee. It focuses on suspensions, removal by teachers, placement review, alternative education, expulsions, juvenile courts, tips for discipline cases, and appeals to the school board. The next section discusses the individuals with disabilities education act amendments of 1997, focusing on the funding formula; state eligibility; evaluations, eligibility and terminations, IEPs and placements; individualized education programs; procedural safeguards; and discipline. The last part of the supplement looks at sexual abuse or harassment of students. Topics addressed here include employee-to-student abuse or harassment, including liability issues; claims under Title IX, such as common-law principles and individual liability; and student-to-student harassment. (RJM)

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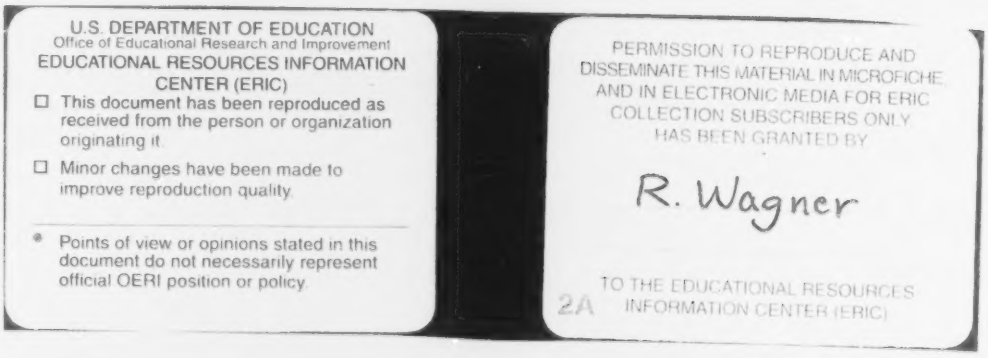
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Publisher's Note

The *1999 Texas School Law: A Practical Guide* is a supplement to the 1996 edition of *Texas School Law: A Practical Guide* ISBN 1-56534-070-1, published by the Education Law Association under its former name, the National Organization on Legal Problems of Education.

This supplement addresses four topics: Real Estate Issues Relating to School Districts and Colleges, Student Discipline Law, Education of Children with Disabilities and Sexual Abuse or Harassment of Students, which have undergone significant changes since the original publication in 1996.

These four topics are intended to replace the material in the 1996 publication.

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REAL ESTATE ISSUES RELATING TO SCHOOL DISTRICTS AND COLLEGES

By: Gray H. Muzzy and Jeffrey J. Horner

I. INTRODUCTION

School district and colleges are confronted with numerous real estate issues, including sales, purchases, donations, and other types of conveyances. This chapter will outline the major legal issues relating to real estate.

II. SALE OF PROPERTY

Before entering into a contract for the sale of school property, an education entity's governing board must authorize the sale through a formal motion, and designate the property to be surplus or desirable of sale. This step is required by Texas Education Code § 11.154(a) which reads: "The board of trustees of any independent school district may, by resolution, authorize the sale of any property, other than minerals, held in trust for public school purposes."[1]

In most cases, the sale of school property must be made through a bid procedure discussed later in this chapter.[2] For the following types of property, however, bidding is not required under § 272.001, *et. seq.*, of the Texas Local Government Code ("272.001"):

- narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or other development control ordinances
- streets or alleys, owned in fee or used by easement
- land or a real property interest originally acquired for streets, rights-of-way, or easements that the political subdivision chooses to exchange for other land to be used for streets, rights-of-way, or easements, or other public purposes, including transactions partly for cash
- land that the political subdivision wants to have developed by contract with an independent foundation

- a real property interest conveyed to a governmental entity that has the power of eminent domain
- a municipality's land that is located in a reinvestment zone designated as provided by law, and that the municipality desires to have developed under a project plan adopted by the municipality for the zone[3]

To satisfy the requirements of § 272.001, the above mentioned types of property need only be sold for a sum of not less than the fair market value of the land or interest sold. The fair market value is conclusively determined by an appraisal obtained by the educational entity that owns the land or interest.[4] Furthermore, if the sale is to one or more abutting property owners who own the underlying fee simple, the sale may be for less than the fair market value.[5] This is a very limited qualification, but would apply in instances where an educational agency is disposing of rights-of-way or easements to the owners of the underlying fee simple.

§ 272.001 also provides other very limited exemptions to the bidding requirement. For example, a school district may sell land to an entity for development of low or moderate income housing on terms "so as to effectuate and maintain the public purpose," including receiving less than fair market value in appropriate situations.[6]

The sale or exchange of most real estate, however, will require compliance with the public notice and bidding procedure established by § 272.001. This procedure mandates that notice of the proposed offer of sale be given to the general public via publication in a newspaper of general circulation in the county in which the property is located or, if there is no such newspaper, in an adjoining county. Publication must take place on two separate dates, set forth a description of the land, including its location, and the procedure by which sealed bids to purchase the land may be submitted.[7] No sale or exchange may occur until after the fourteenth (14th) day after the date of the second publication.[8] Most sales are for cash. Installment sales, while permissible, are rare and are not recommended.

There are no requirements as to the precise contents of the bid package. It is recommended, however, that the package contain a purchase agreement form that the school is willing to sign, with the purchase price left open for each bidder to complete, and an instruction letter to the bidder. In addition to provisions generally found in contracts for sale of property, the form of purchase

agreement should contain any special terms and conditions required by the school, including the reversionary restrictions against use or operation of the property for a segregated school more fully discussed below, and any other use restrictions the school may wish to impose on the property.

The bid instructions should instruct the bidder to complete the purchase price in the form of purchase agreement, sign and date the purchase agreement, and should specify a date certain by which the bid must be received by the school. In addition, the bid instructions should specify that the school can reject any and all bids and should specify a date by which all bidders will be notified as to whether their bid is accepted.

Once the terms and conditions of the purchase agreement are satisfied, the property will be conveyed by deed. It is recommended that the deed be without warranty or with special warranty of title only. The deed must recite the resolution of the school board authorizing the sale and, for elementary and secondary schools, must contain the reversionary restrictions against use or operation of a segregated school required by the order of Judge William Wayne Justice in *United States of America v. State of Texas, et al,* in Civil Action No. 5281. That is, the party to which the property is being sold must agree not to use the property for the purposes of a segregated school, or the property will revert back to the school district. Alternative language to this reversionary clause is available upon prior approval by the Texas Education Agency. Failure to include this language in the closing documents could render the real estate transaction void.

III. PURCHASE OF REAL PROPERTY

The method of purchasing real property for school districts and colleges does not differ from those used in private transactions, except in those cases where the purchase is financed.[9] No specific bidding requirements exist for school districts and colleges relating to the purchase of property. Rather, property may be purchased for the best negotiated price. Preclosing steps typically include securing:

(1) An executed purchase agreement.

(2) A commitment for an owner's policy of title insurance issued by a qualified title company.
(3) A survey of the property (usually at the seller's cost).
(4) An environmental audit to detect possible environmental hazards and to comply with requirements of Texas National Resources Conservation Commission.
(5) Satisfactory evidence that the property has adequate access and all necessary utilities will be available for the use of the property at acceptable rates, including necessary storm water drainage.
(6) An engineer's report, if building or other structures are included in the property.

Tex. Loc. Govt. Code § 271.004(a) allows school districts and colleges to purchase real property through financing, if certain criteria are met. Specifically, if such a contract is proposed, notice of the contract should be published not less than sixty (60) days prior to execution of the contract in a newspaper of general circulation within the district. This notice must summarize the major provisions of the proposed contract and shall estimate the construction and other costs.[10] If within this period, a written petition of at least five percent of the registered voters is received, approval of the contract is subject to public referendum.[11]

At the closing, the school district should receive:

(1) A warranty deed conveying property to the district in fee simple title, subject only to the exceptions to title disclosed by the survey and title commitment and approved by the school district.
(2) Evidence of authority from the seller to sell the property.
(3) An owner's policy of title insurance insuring title to the property (generally at seller's expense).
(4) A FIRPTA affidavit signed by the seller certifying the seller's tax identification number and that the seller is not a foreign entity.
(5) The closing will be very similar to closings for private transactions.

Prior to the closing of a real estate purchase, it is important that a school district or college perform the research or due dili-

gence necessary to ensure the property to be acquired is satisfactory for the school's intended use. This would include the following:

(1) Title and Survey: Prior to closing, the school district or college should secure a survey of the property to be acquired, as well as a commitment for title insurance covering the property. Approval of both should occur prior to the obligation of closing the transaction. The survey will provide the school district with a physical drawing of the property, and all encumbrances located on the ground, including any encroachments, improvements, easements, or building set back lines. The title commitment will identify the owner of the property (which should be identical to your seller), and all encumbrances or restrictions filed of record such as use restrictions, easements, outstanding mineral interests, leases and mortgages or other liens against the property. The title commitment also constitutes the binding obligation of the issuer, following satisfaction of the requirements set forth therein, to ensure the school district's fee simple title in the property following closing, subject only to those matters set forth in the title commitment. The title commitment and survey should be reviewed carefully to ensure that nothing is disclosed that would prevent or prohibit the school district or college from using the property for its intended purpose.

(2) Environmental Audit: By acquiring land, a school district or college is also exposing itself to the cost of remediating any environmental contamination of the land, regardless of whether it did or did not cause the contamination. In addition, should the property contain more than one (1) acre and is to be developed, the Texas Health and Safety Code requires testing samplings to be taken of the property to confirm that the property is not located on a municipal landfill.[12] Consequently, as a condition to closing, a school district or college should generally require that it has secured and approved an environmental audit of the property to be bought. The audit is generally done at the buyer's expense, and should include a detailed study of past uses of the property, including a study of existing aerial

photos from prior years, to determine if there have been any past uses which might suggest a contamination problem. Also, a review of the records of the Texas Railroad Commission to determine if there has been any oil and gas development activity on the property, a review of the records of the Environmental Protection Agency, the Texas Natural Resources Conservation Commission, and any local agency charged with responsibility for environmental conditions is advisable. In addition, the audit should include a physical inspection of the property to determine if there is any stressed vegetation or other visible signs that might suggest contamination, as well as subsurface testing sufficient to satisfy the requirements of Texas Health and Safety Code § 361.538. If there are indications of potential contamination, additional physical testing of the soil and groundwater may also be required to determine the existence of contamination.

(3) Wetlands: A determination should be made as to whether any portion of the property would be considered wetlands by the Environmental Protection Agency or U.S. Corps of Engineers guidelines. This may be included as part of the environmental audit.

(4) Access and Utilities: A determination should be made as to whether the property has adequate access for the contemplated use, including curb cuts and median cuts to enable the orderly flow of school buses or other traffic. Additionally, it should be determined whether the site has adequate utility service for its intended use, including the physical location of pipelines and electrical service. If the school site is located within a private utility district, special attention should be given to securing commitment letters for water and wastewater capacity and the rates at which that capacity will be provided. Also, be attentive to special charges, such as tap and stand-by fees, which may be extraordinarily high for school districts and colleges. Because school districts are not tax-paying entities, private utility districts will often make up the loss in tax revenues by charging increased fees for school-owned land. Attempts can be made to negotiate these fees down to a lower level.

(5) Storm Water Detention: A determination should be made as to whether any storm water detention require-

ments may be imposed upon the school as a condition to the construction of any improvements on the land.

(6) Engineering: If the school is buying improved property, an engineering study of the improvements should be conducted to determine their integrity and establish that all necessary permits have been acquired.

To provide adequate time to complete its due diligence, the school district or college should require a due diligence period in its purchase agreement. Sixty to 120 days following execution of the purchase agreement is not uncommon. During this time, the school district would have access to the property to conduct its inspections and would be entitled to terminate the purchase agreement for any reason prior to the end of the due diligence period. Most purchases will be made from cash already available for that purpose. As described above, however, the purchase may be financed.[13] There is no customary form of real property purchase agreement, although many concepts are consistent throughout. It is recommended that a purchaser secure the advice of an attorney prior to any purchase agreement.

IV. CONDEMNATION

If attempts at buying property are futile, school districts and colleges in Texas can acquire property through the condemnation process. It first should secure an appraisal of the fair market value of the property from a qualified real estate appraiser. Once the appraisal is received and analyzed, the school is then required to make a good faith offer of settlement to the property owner.[14] Generally, an offer is made at or near the appraised value. If this offer is rejected, the school district or college is free to resort to the condemnation process.

The school would file a lawsuit in the county court at law where the property is located. Within normally two (2) weeks after the lawsuit is filed, the court will appoint three (3) special commissioners.[15] The commissioners are typically lawyers or real estate appraisers who have knowledge of the real estate market and the condemnation process. They will meet and hear evidence from both parties concerning the fair market value of the property. After hearing this evidence, they will render a commissioners award, which represents the fair market value of the property as of the date of the hearing.

If either party is dissatisfied with the award, it may file objections to the award with the court within 20 days after the date of the award.[16] If objections are filed, the lawsuit is then submitted to county court for a trial by jury like any other lawsuit. In the interim, the school can take possession of the property by filing a bond or depositing the amount of the commissioners' award in escrow into the registry of the court.[17] Once the bond or deposit is posted, the school is free to take possession of the property.

If objections are filed, the case will either be settled, or a jury will consider the case. Generally, the only issue submitted to the jury at trial will be the fair market value of the property. If either side is not satisfied with the jury verdict, it can be appealed through the appellate court system like any other lawsuit.

V. CONCLUSION

In most respects, school real estate transactions do not vary from those in the private sector, particularly regarding the purchase of real property.[18] Regarding the sale of real property, however, certain statutes, such as those outlined in this article, are unique to school districts and/or colleges and should be followed. In particular, all bidding requirements regarding the sale of school property should be observed where required.

ENDNOTES

[1] Tex. Educ. Code § 11.154(a). The sale of mineral interests by a school district is governed by Tex. Educ. Code § 11.153.
[2] Tex. Loc. Govt. Code § 272.001, *et. seq.*
[3] Tex. Loc. Govt. Code § 272.001 (b).
[4] *Id.*
[5] *Id.*
[6] *Id.* at § 272.001 (g).
[7] Tex. Loc. Govt. Code § 272.001.
[8] *Id.*
[9] Tex. Loc. Govt. Code § 271.004.
[10] *See Id.* at § 271.004(a).
[11] *See Id.* at § 271.004(b).
[12] *See* Tex. Health and Safety Code § 361.538(a).
[13] Tex. Loc. Govt. Code § 361.538(a).
[14] Tex. Prop. Code § 21.021
[15] *Id.* at § 21.031.
[16] *Id.* at § 21.018.
[17] *Id.* at § 21.021.
[18] *Id.* at § 21.012

STUDENT DISCIPLINE LAW

By: Jeffrey J. Horner

I. INTRODUCTION

Often, school administrators and school attorneys have struggled with the appropriate procedures to be followed in the discipline of public school children. In part, this is due to the seemingly endless changes in student discipline law over the last 10 years. The student discipline laws were changed significantly with the enactment of Senate Bill 1 during the 1995 legislative session and other changes enacted during the 1997 legislative session. This chapter will provide an overview of current Texas student discipline law after the changes of the 1995 and 1997 legislative sessions. Further, it will provide practical tips on how to handle discipline cases.

II. GENERAL OVERVIEW OF CHAPTER 37

A. General Provisions

Most of the provisions relating to the administration of discipline now appear under Chapter 37 of the Texas Education Code, effective September 1, 1995. Chapter 37 also underwent significant legislative changes in 1997. These statutes contain many changes and offer numerous disciplinary options.

First, under Texas Education Code § 37.001(a), the board of trustees of each school district must adopt a code of student conduct with the advice of its district level committee. The student code of conduct must be prominently displayed at each school campus. It must establish standards of student conduct and specify the circumstances under which a student may be removed from the classroom, campus, or an alternative education program ("AEP"). It also shall outline the conditions under which a student may be suspended, expelled, or transferred to an AEP. Once the code of student conduct is established, it can only be changed

or amended by approval from the district board of trustees. Although it is not required by the code, school districts should give their students notice of the student code of conduct at the beginning of each school year.

Under § 37.001(b), a teacher with knowledge that a student has violated the student conduct code shall file with the principal or other appropriate administrator a written report documenting the violation. A copy of the written report, not to exceed one page, must also be sent to the student's parents within 24 hours after receipt of the report from a teacher. Under § 37.007(g), the school district must inform each teacher of the conduct of a student who has engaged in an expellable offense. The teacher's teaching certificate may be revoked or suspended if the teacher breaches this confidentiality. Under § 37.018, each school district must provide a copy of Chapter 37 and local policy relating to student discipline to each teacher and administrator.

B. Suspensions

Under § 37.005, a principal or other administrator may suspend a student who engages in conduct for which the student may be placed in an AEP. School districts may create their own lists of conduct for which alternative education placement or suspension is appropriate. A suspension may not exceed three (3) school days. However, under the new law there is no limitation on the number of suspensions an individual may receive; presumably, a student can be suspended an unlimited number of times.

Further, § 37.005 does not provide specific rights of appeal or review of a suspension. However, pursuant to the dictates of Goss v. Lopez,[1] a landmark student discipline case decided by the United States Supreme Court in 1975, minimal due process should be afforded a student prior to the imposition of a suspension. Minimal due process includes oral or written notice of the reasons for suspension and an informal opportunity for the student to provide his or her side of the story. There is no requirement to consider alternative discipline techniques before suspending a student.

C. Removal By Teachers

Section 37.002(a) allows teachers to send students to the principal's office in order to maintain effective discipline in the classroom. The principal must respond by employing discipline management techniques consistent with the student code of conduct. This process is known as informal removal.

However, § 37.002(b) and (c) allow for formal removal. Formal removal is permitted if a teacher documents that a student repeatedly interferes with the teacher's ability to communicate effectively with the other students or with the ability of the student's classmates to learn, or determines that the student's behavior is so unruly, disruptive, or abusive that it seriously impairs the teacher's ability to communicate with students. In this event, the teacher then may remove the student to the principal for placement in another classroom, in-house suspension, or an AEP. In addition, the principal may not return the student to the teacher's class without the teacher's consent unless the "placement review committee" (Section 37.003) determines that return to the teacher's class is the best or only alternative available. The terms of the removal may prohibit the student from attending or participating in school-sponsored or school-related activity.

Under Section 37.009(a) if a student is removed from the class by a teacher, the principal or appropriate administrator must schedule a hearing with the student, the parent or guardian, the teacher, and the principal or other administrator. This hearing must be scheduled no later than the third class day after the day a student is removed from the class. The student is entitled to written or oral notice of the reasons for removal, an explanation for the basis of the removal, and an opportunity to respond to the reasons for the removal. The student may not be returned to the regular classroom pending the conference. Following this conference, and whether or not each requested person is in attendance after valid attempts to require the person's attendance, the principal or appropriate administrator must order placement of a student for a period consistent with the student conduct code as provided in § 37.002 or § 37.006.

Finally, § 37.002(d) requires teachers to remove students who engage in conduct in which placement in an alternative education program or expulsion is required under § 37.006 or § 37.007. This section thus gives teachers significant rights in removing students from classes, and makes it less likely that an unruly student will return to the original teacher's class.

D. Placement Review Committee

Section 37.003 also requires the establishment of a three-member placement review committee at each school. Under § 37.003, the purpose of the committee is to determine the placement of a student when a teacher refuses to readmit the student to class, and to make recommendations to the school district regarding the readmission of expelled students. The placement review committee at each school is composed of one administrator selected by the principal and two teachers selected by the faculty, as well as one alternate. The teacher refusing to admit the student cannot serve on the committee.

E. Alternative Education Program

Section 37.006 also addresses removal of students to AEPs. When Chapter 37 was amended in 1997, the Legislature included certain statutory reasons for which a student may be placed into an alternative education program. A student may be placed in an alternative education program if the superintendent or designee has a reasonable belief that the student has engaged in conduct away from school which is defined as a felony other than those set out in Title V of the Penal Code, and the continued presence of the student in the regular classroom threatens the safety of other students or teachers or will be detrimental to the educational process. In determining whether there is a reasonable belief that a student has engaged in conduct defined as a felony offense by the Penal Code, the superintendent or his designee may consider all available information, including the information furnished under Article 15.27, Code of Criminal Procedure (e.g., police reports).

Other than the non-Title V off-campus felony offenses referred to in Section 37.006(d), the Education Code is silent as to when a school district may, at its discretion, place a student in an alternative education program. School districts probably can remove students to alternative education programs for any type of misconduct identified in its code of conduct. The code of conduct must delineate in writing that removal to an alternative education program may be a consequence of the particular act of misconduct.

Certain types of misbehavior require mandatory removal to an AEP. Included in this category are certain types of misconduct

committed on school property, within 300 feet of school property, or while attending a school-sponsored activity. These examples of misconduct include:

- Engaging in any conduct punishable as a felony.
- Engaging in conduct that contains the elements of assault.
- Engaging in conduct that contains the elements of terroristic threats.
- Selling, giving, delivering, possessing or being under the influence of a controlled substance or other dangerous drug.
- Selling, giving, delivering, possessing, or being under the influence of an alcoholic beverage.
- Engaging in conduct that contains the elements of an offense relating to abusing glue or aerosol paint, or relating to volatile chemicals.
- Engaging in conduct that contains the elements of public lewdness.
- Engaging in conduct that contains the elements of indecent exposure.
- Engaging in conduct that contains the elements of retaliation against a school employee.

The Code also mandates removal to an AEP for certain off-campus offenses. If a child is off school property and not in attendance at a school sponsored activity, a student must be removed from class and placed in an alternative education program if:

- The student receives deferred prosecution under Family Code § 53.03 for conduct defined as a felony in Title V[2] of the Texas Penal Code.
- A court or jury finds that the student has engaged in delinquent conduct under § 54.03 of the Texas Family Code for conduct defined as a felony in Title V of the Penal Code.
- The superintendent or designee has a reasonable belief that the student has engaged in conduct defined as a felony offense in Title V of the Penal Code.

In determining whether there is a reasonable belief that a student has engaged in conduct defined as a felony offense by the Penal Code, the superintendent or the superintendent's designee may consider all available information, including the information furnished under Article 15.27, Code of Criminal Procedure.

Chapter 37 is silent regarding the maximum or minimum length of removal to an AEP. However, before a school district can place a student in an AEP for a period that extends beyond the current school year, it must determine that: (1) the student's presence in the regular classroom program or at the student's regular campus presents a danger of physical harm to the student or another individual, or (2) the student has engaged in serious or persistent misbehavior that violates the school district's student code of conduct.

Students possess the right to appeal AEPs placement. Specifically, if a student's placement in an AEP, whether mandatory or permissive, extends beyond the next grading period, a student's parent or guardian is entitled to notice and an opportunity to participate in the proceeding before the school board or its designee regarding the placement. The decision of the board or its designee is final and non-appealable. The board or its designee shall set a term for a student's placement in an AEP under § 37.002 or § 37.006, and must deliver a copy of the order placing the student in the AEP to the student. To lessen the workload of school boards, the author suggests delegating the hearing to a designee.

Further, a student placed in a AEP for 120 days or more shall be provided with a review of his or her status, including a review of the student's academic status, at intervals not to exceed 120 days. At the review, the student or the parent or guardian must be given the opportunity to present arguments supporting the studen's return to the regular classroom program. In the case of a high school student, the board's designee must review with the student's parent or guardian progress toward graduation and establish a specific graduation plan for the student. Furthermore, the student cannot be returned to the classroom of the teacher who removed the student without the teachers consent.

Section 37.019 of the Code relates to emergency placement. The principal or his/her designee may order the immediate placement of a student in an AEP if the principal or his designee reasonably believes that the student's behavior is so unruly, disruptive, or abusive that it seriously interferes with the teacher's ability to effectively communicate with the students in a class, the

ability of the student's classmates to learn, or with the operation of school or a school-sponsored activity. Oral notice of the reason for emergency placement must be given at the time of the placement in an AEP. However, the due process required for a non-emergency placement must be afforded to the student within a reasonable time of the emergency removal. The principal or his or her designee is not liable for civil damages for an emergency placement.

The academic mission of alternative education programs is to enable students to perform at grade level. Specific requirements exist for AEPs under § 37.008. Specifically, AEPs must be provided in a setting other than the student's regular classroom and separate from students who are not assigned to the program on or off the regular school campus. The curriculum in a AEP must focus on English language arts, mathematics, science, history, and self-discipline. Schools must also provide supervision and counseling, and may provide for a student's transfer to a different educational setting. The school district must allocate to an AEP the same expenditure per student that would be allocated to the student's school if the student were attending his or her regular campus. If a student enrolls in another school district before the expiration of the period of placement, the board of trustees shall provide to the district in which the student enrolls a copy of the placement order. The new district may continue the alternative education program placement under the terms of the order, or may allow the student to attend regular classes without finishing the period of placement.

F. Expulsions

The new law also allows for student to be expelled from school under limited circumstances. Under § 37.007, a student age 10 or older shall be expelled from school if the student, on school property or while attending a school-sponsored or school-related activity on or off school property:

- Uses, exhibits, or possesses a firearm, illegal knife, club, or prohibited weapon.
- Engages in conduct that contains the elements of the

offense of aggravated assault, sexual assault, or aggravated sexual assault.

- Engages in conduct that contains the elements of the offense of arson.
- Engages in conduct that contains the elements of the offense of murder, capital murder, or criminal attempt to commit murder or capital murder.
- Engages in conduct that contains the elements of the offense of indecency with a child.
- Engages in conduct that contains the elements of the offense of aggravated kidnapping.
- Brings a firearm to school (including students under the age of 10).
- Engages in conduct that contains the elements of any offense listed above against any employee in retaliation or as a result of the employee's employment with the school district.

A student may be expelled if the student, after being placed in an AEP, continues to engage in serious or persistent misbehavior that violates the district's student conduct code or if the student sells, gives, delivers to another person, uses, or is under the influence of any amount of marijuana, a controlled substance, a dangerous drug, or alcohol at school or a school sponsored event. Additionally, a student may be expelled if they engage in conduct that contains the elements of an offense relating to abusable glue, aerosol paint, or volatile chemicals at school or a school sponsored event. Further, a student may be expelled if he or she engages in conduct which contains the elements of felony criminal mischief under § 28.03 of the Texas Penal Code.

If a student brings a firearm to school and is expelled, the expulsion from the student's regular school setting must be for a period of one year. A superintendent or other chief administrative officer of the school district may modify the length of the expulsion, and the district or other local educational agency may provide educational services to the expelled student during this time. The district must provide education in an alternative education program to a student who is less than 10 years old and who is expelled for a firearm offense. There are no other direct limitations on the length of expulsions. Theoretically, a school district could indefinitely expel a student for any expellable offense, although this practice is frequently employed.

Section 37.009(f) requires that before a student can be expelled, the school board or its designee must provide a student with a hearing that affords the student appropriate due process as required by the United States Constitution. At the hearing, the student may be represented by the student's parent or guardian, or another adult who can provide guidance to the student. However, if the district makes a good faith effort to inform the student and the student's parent or guardian of the time and place of the hearing, the district may hold the hearing regardless of whether the student, the student's parent or guardian, or another adult representing the child attends. If the decision to expel a student is made by the board's designee, the decision may be appealed to the board. Thus, a full evidentiary hearing need not be held before the school board. Rather, the evidentiary hearing can be held before the designee, with any appeal to the board being based on the record developed by the designee.

The decision of the board may be appealed by trial de novo to a district court in the county in which the school district's central administrative office is located. The board or the board's designee shall deliver to the student and their parents or guardian a copy of the order expelling the student. Under State Board of Education rules,[3] the process which must be provided a student prior to expulsion includes:

1. Prior notice of the charges and the proposed sanctions.
2. The right to a full and fair hearing.
3. The right to adult representation or legal counsel.
4. The opportunity to testify and present evidence and witnesses.
5. The opportunity to examine the evidence presented by the school administration and to question the administration's witnesses.
6. Notice before the hearing of the administration's witnesses and any documents that the district intends to use at the hearing, in sufficient time before the hearing to allow preparation of a defense.

Under Section 37.010(g), if an expelled student enrolls in another school district, the board of trustees of the district that expelled the student must provide to the district in which the student enrolls a copy of the expulsion order and the referral to the authorized officer of the juvenile court. The enrolling district may continue the expulsion, place the student in an AEP in lieu of ex-

pulsion, or allow the student to attend regular classes without completing the expulsion.

G. County Juvenile Courts And Juvenile Boards

The Education Code also provides for the establishment of county juvenile courts and juvenile boards. Section 37.010 requires that not later than the second business day after the date a student discipline hearing is held under § 37.009, the school board or its designee must deliver a copy of the order expelling or placing a student in an AEP to the authorized officer of the juvenile court in the county in which the student resides.

Furthermore, a court may not order a student expelled under § 37.007 to attend a regular classroom, regular campus, or an AEP as a condition of probation, unless the juvenile board has entered into a memorandum of understanding with the school district concerning the juvenile probation department's role in supervising and providing other support services. If a student is expelled under § 37.007, upon recommendation of the placement review committee established in § 37.003 or on the school district's own initiative, the district may readmit the student while the student is completing any court disposition requirements. Any placement in an AEP by a court must prohibit the student from attending or participating in school-sponsored or school-related activities. Additionally, a person is not liable for civil damages for referring a student to a juvenile court.

Section 37.011 creates a new type of AEP. Counties with populations of 125,000 or more must develop a juvenile justice AEP, subject to the approval of the Texas Juvenile Probation Commission. A juvenile board of a county of less than 125,000 people may develop a juvenile justice AEP, but it is not required to be approved by the Texas Juvenile Probation Commission and is not subject to other restrictions placed upon counties with populations exceeding 125,000. Under § 37.011(b), if a student is found to engage in conduct relating to an expellable offense under § 37.007(a), (d) or (e), and a student is found by a juvenile court to have engaged in delinquent conduct under § 54.04 of the Family Code, the juvenile court must require the juvenile justice AEP in the county in which the conduct occurred to provide educational services to the student and order the student to attend the program from the date of his or her adjudication. A juvenile justice AEP must operate at least seven 7 hours per day for180 days per year, and may be pro-

vided in a facility owned by a school district. A student transferred to the juvenile justice AEP by a juvenile court must participate in the program for the full period ordered by the juvenile court, unless the student's school district agrees to accept the student before the date ordered by the court. The juvenile court may not order a period of transfer to a county juvenile justice AEP for a period that exceeds the term of the probation ordered by the juvenile court.

Juvenile justice alternative education programs must establish an academic mission to enable students to perform at grade level and must focus on English language arts, mathematics, science, social studies, and self-discipline. Further, each school district in a county with a population exceeding 125,000 must enter into a joint memorandum establishing:

1) the responsibilities of the juvenile board in establishing a juvenile justice alternative education program.
2) conduct that the school district has defined in its student code of conduct for which a student may be placed in the juvenile justice alternative education program.
3) funding for the juvenile justice alternative education program.
4) a timely placement policy and specifications for a term of placement for expelled students under 57.041(d) of the Family Code.
5) transportation and transitioning policies for students placed in the juvenile justice alternative education program.
6) conditions under which a juvenile may be allowed to remain in the juvenile justice alternative education program once the juvenile is no longer under court jurisdiction.
7) a plan to address special education services required by law.

Under § 37.012, a school district in which a student is enrolled on the date the juvenile court orders the student to attend a juvenile justice AEP must provide funding to the juvenile board for the portion of the school year for which the juvenile justice alternative education program provides educational services in an amount determined under § 37.011(k)(2).

III. PRACTICAL TIPS FOR DISCIPLINE CASES

A. Investigation

Generally, the first step in a student discipline case is the investigation of the alleged misconduct. Often, a complaint of student misconduct comes to an assistant principal. For example, a teacher may report that students have been fighting on the playground. After receiving a report from the teacher, it is standard procedure for the administrator to talk to an accused student and ask whether the student committed the act in question and learn the student's side of the story. If the student agrees with the teacher's report, the confession ends the matter, and the appropriate punishment may be imposed. However, if the student disagrees with the facts, the administrator should make further inquiry if there are other witnesses who have facts concerning the event. If there are simply two views of what happened, the school official may believe whomever he or she feels is the most credible. This process is the "hearing" contemplated by *Goss v. Lopez* for suspensions.

B. The Hearing Process

School districts have considerable flexibility in determining the procedures used for student discipline hearings, subject to state law. More formal procedures are necessary in expulsion cases. Some school districts require hearings be held before the school board. However, most districts provide that board designees, usually administrators such as principals, hear expulsion cases first. In Texas, the option is left to the school district, although expulsions can be appealed by students to school boards as a matter of right.

The author suggests leaving the initial expulsion hearing to the board designee, who is usually the school principal. Several benefits may be attained by using this method. Having the designee hold the hearing helps assure that the student receives

appropriate due process at the earliest time and at the lowest administrative level. Also, communication at this level is generally easier than if the hearing is held at the board level, and there is less likelihood of attorney involvement at lower-level hearings. The absence of attorneys may assist in the resolution of cases without the need for long and protracted hearings or other proceedings. Perhaps the most important reason to hold the initial hearing before the designee is that the designee is usually the person in charge of the school building. Having the designee make decisions regarding discipline reinforces the designee's authority and leadership.

Because a student is entitled to a fair hearing, the designee should avoid becoming overly involved in investigating the case prior to the hearing. In those few cases in which the designee may become intimately involved in the investigation, another administrator should be appointed to hear that particular case. In the expulsion hearing, the board president, if the hearing is before the board, or the board's designee, if the hearing is at a lower level, will preside and present the ground rules. The Texas Open Meetings Act does not apply to hearings before the board's designee, so a hearing at this level need not be open to the public.

At a hearing before the board's designee, he or she may read a standard outline with any appropriate additions to cover the specific case at hand. This outline should be handed out to all in attendance so everyone will be apprised of the ground rules. The administration has the burden of proving by a preponderance of the evidence that the student violated a rule and should be expelled. Because it is not a criminal proceeding, the reasonable doubt standard does not apply. If the student has an attorney at the hearing, the district may wish to have the school district's attorney in attendance to represent the administration or simply to keep the other attorney from controlling the hearing.

The proceeding should be tape recorded or recorded by a court reporter. This recording can later be used for appeals to the board, and eventually to prepare a transcript if the case is appealed to the courts. Court reporters' transcripts are considerably more expensive than tape recordings, and in most instances a good tape system will suffice for recording the proceedings. However, if a case appears to be particularly difficult or complex, or is likely be appealed, use of a court reporter is advisable.

The administration should begin the proceedings by presenting its case. After the administration has presented its witnesses

and evidence, the student should then present his or her witnesses. Again, time limits should generally not be placed on the presentations; however, the designee may impose reasonable restrictions on the presentation of evidence. If the designee is in doubt about the admission of any evidence, it is usually safer to admit it to ensure that all relevant evidence is considered.

After the evidence has been presented, the designee should allow rebuttal evidence and closing arguments. The designee may then deliberate and render a decision. The decision should have two parts. The first finding is whether the student violated the rule, and the second finding (if necessary) is the appropriate punishment. The designee may also render a decision at a later date. However, unless there are unusual circumstances, it should be rendered within a few days after the hearing. Any oral decision made at the time of the hearing should be confirmed in writing with an explanation of the basis for the decision. The designee should make specific findings of fact, and should also delineate the appropriate punishment for any offense.

C. Appeals to the School Board

Under Texas law, a student who has been through the hearing process and faces expulsion is entitled to appeal to the school board. The appeal to the board can be based upon the record made by the designee. That is, the board can listen to the tape recording or read the transcript of the proceeding before the designee and review any documents presented to the designee. If the appeal before the board is based on the record developed before the designee, the student and his or her parents should be so advised in the original notice letter relating to the designee's hearing.

Prior to the hearing before the board, the student and his or her parents should receive written notice of the date of the hearing and the procedure to be followed. The procedure for the hearing should be similar to that followed in an appellate argument. That is, the two sides each have an opportunity to present their cases based upon the evidence presented at the earlier hearing. No new evidence should be submitted to the board, although some districts permit new evidence to be introduced at the board hearing on the record if the student or student's parents can demonstrate good cause why the evidence was not submitted at the hearing before the designee. Once it has considered the record

and heard arguments from both sides, the board can deliberate and make its decision. The board should also adopt findings of fact and conclusions of law in support of its finding, and should send a letter to inform the parents and student of its decision. Once again, it is appropriate for the board to make its decision either at the time of the hearing or at a later date. Generally, the sooner the decision is made, the better.

If the student appeals to the board based on a completely new hearing of the evidence, a letter similar to that sent by the board designee should be sent to the parents concerning the ground rules for the hearing. In this instance, the hearing before the board will be completely redone. That is, the witnesses will have to testify again. The outline used by the designee can be adapted for use by the board. Again, this outline should be provided to all parties so everybody knows what the procedures will be. It is appropriate that the school district use an attorney at the board hearing if the student has an attorney. The procedures for a full hearing before the board are generally the same as the initial hearing before a designee.

The administration and the student or student's parents should be permitted to present proposed findings of fact and conclusions of law to the board. These findings can be simple, and can track those made by the designee if the evidence supports them. If the designee's decision is well written, the board can sustain the administration's actions and adopt the designee's findings as those of the board.

Once a vote is taken concerning the discipline of a student, the board should write a letter to the parents and student, formally notifying them of the board's decision. If the board finds that the student did commit the acts and should be punished, the board should state the outcome of its vote. The student and parent or guardian will then have the right to take any appeal allowed under law. If the punishment is expulsion, the proper appeal is to state district court in the county in which the school district's administrative offices are located. The board should also send notice of the expulsion to all appropriate administrative agencies as outlined in the Education Code.

IV. CONCLUSION

Recent legislative changes have greatly complicated student discipline matters for Texas school districts. Other than in cases

of severe misbehavior which constitute expellable offenses, school districts are responsible for the ongoing supervision and education of students who engage in misconduct, primarily through the establishment of required AEPs. Further, the new legislation establishes county juvenile AEPs, which afford educational services to students outside of the regular school environment. Many public officials at both the school district and county levels are now directly involved in student discipline. Only time will tell whether this interactive effort will provide positive results for Texas school districts in dealing with student misbehavior.

ENDNOTES

[1] 419 U.S. 565 (1975).

[2] Title V felony offenses include: murder, capital murder; manslaughter, criminally negligent homicide; false imprisonment, kidnapping, aggravated kidnapping, indecency with a child, sexual assault; aggravated assault; aggravated sexual assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; deadly conduct; terroristic threat; aiding suicide; and tampering with a consumer product. Some offenses listed above are not punishable as a felony in all situations. AEP placement is only mandated when the student has engaged in conduct punishable as a felony.

[3] *See* 19 Tex. Admin. Code § 133.23.

EDUCATION OF CHILDREN WITH DISABILITIES

By: Christopher P. Borreca

I. OVERVIEW OF PUBLIC LAW 105-17, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997

A. Introduction

The Individuals with Disabilities Education Act ("IDEA") has been in existence for 22 years. On June 4, 1997, the IDEA was reauthorized pursuant to Public Law 105-17. The purpose of the reauthorization of the IDEA was to strengthen the role of parents, ensure students with disabilities access to the general education curriculum, provide focus for teaching and learning while reducing unnecessary paperwork requirements, assist educational agencies in addressing the cost and approving special education and related services to children with disabilities, provide increased attention to racial, ethnic, and linguistic diversity to prevent inappropriate identification and mislabeling, ensure that schools are safe and conducive to learning, and encourage parents and educators to work out their differences by using non-adversarial means.

While this may be the purpose of the reauthorization, and while such aims may be admirable, the reality of their achievement through this legislation will be not fully known until complete regulations are developed and court interpretations of the reauthorized language are received. Following is a section-by-section analysis of the significant changes to the law affecting public school districts.

B. Section 1401. Definitions

"Serious emotional disturbance" has been changed to "emotional disturbance." With state and local educational agency approval, "Developmental delay" has been expanded as a pos-

sible disability category to include children ages three through nine.

"Parent" has been expanded to include legal guardians and surrogate parents.

"Related service" has been expanded to include orientation and mobility services.

"Transition services" has been changed to include related services, along with instruction, community experiences, the development of employment and other post-school adult living objectives.

C. Section 14.06. Requirements for Prescribing Regulations

The new law has significantly curtailed the Secretary of Education's ability to modify the IDEA through his interpretations of the law and his implementing regulations. Formally, the Office of Special Education Programs issued letters of clarification that sometimes included new mandates for state and local education agencies to follow. The law now requires the Secretary of Education to follow the federal version of the Administrative Procedures Act before developing new regulations through its interpretations. Wider dissemination of the Secretary of Education Agency's interpretations is also mandated by the new law. It is also clear that the Secretary's written responses for clarification will be provided as informal guidance and will not be legally binding.

D. Section 1411. Funding Formula

The formula has been changed from one based on the number of children with disabilities to one based on census and poverty. The funding formula was changed to address Congress's perceived problem that children are being over-identified as having disabilites. Congressional concern was greatest for over-identification of minority children.

E. Section 1412. State Eligibility

States are no longer required to periodically resubmit documentation in order to establish their continuing eligibility to receive funds under Part B. This may lessen paperwork requirements

from Texas Education Agency as they are passed on to local education agencies. The new law makes it explicit that states are required to make a free appropriate public education ("FAPE") available to all eligible children with disabilities, including children with disabilities who have been suspended or expelled from school. State educational agencies must also conduct child-find activities, including identification of children in private schools, and a process to determine which children are in need of special education and which children are receiving it.

In order for parents to be reimbursed for unilateral private placements, parents must now give notice about their concerns and intent to place their child at the most recent IEP meeting or written notice 10 days before they transfer the child to the private school. Prior to removing the child from the public school, if the district informed the parents of its intent to evaluate the child, the parents must make the child available for such an evaluation. If the parents do not comply with notice and evaluation requests or engage in unreasonable actions, the hearing officers and courts may reduce or deny reimbursement to parents for unilateral private placements. Exceptions are made if the parents are illiterate or cannot read English, if emotional harm would result to the child, if the school district prevented the parents from complying with these requirements, or the parents had not received notice with regard to the possible consequences of noncompliance.

The reauthorization also specifically limits the total amount of money that must be spent to provide special education and related services to children in the state with disabilities who have been placed by their parents in private schools to a proportional amount of the federal funds available under Part B. School districts may provide special education and related services on the premises of private, including parochial schools. The reauthorized IDEA also clarifies that child find, identification, and evaluations as required under the law apply to children placed by their parents in private schools. Section 1412 also specifies that parents may be reimbursed for the cost of a private educational placement when a due process hearing officer or judge determines that a public agency had not made FAPE available to the child. Previously, the parents were also required to show that the private placement provided an appropriate program. The current law does not make such a specification, and there is a question as to whether the statute has changed the "common law" requirement of a two-prong test for reimbursement for private placement.

A provision was also added to the Act to strengthen the obligation to ensure that all services necessary to ensure FAPE are provided through the coordination of public educational and non-educational programs. This reinforced the principle that the state agency or local education agency responsible for developing a child's IEP can look to non-educational agencies, such as Medicaid, to pay for or provide services the district is otherwise responsible for and that the state agency or local education agency remains responsible for ensuring the children receive all the services described in their IEPs in a timely fashion, regardless of whether another agency will ultimately pay for the services. Students who are Medicaid-eligible and meet the standards applicable to Medicaid are not disqualified for reimbursement by Medicaid agencies because they are provided services in a school context in accordance with a child's IEP. If a public agency other than an educational agency fails to provide or pay for services they are otherwise obligated to provide, the school district must provide or pay for such services and may then claim reimbursement for the services from the public agency that failed to provide or pay for such services.

Section 1412 also makes changes regarding personnel standards. It allows states greater flexibility in ensuring that personnel necessary to carry out Part B are available by allowing para-professionals and assistants who are appropriately trained and supervised to be used in meeting the requirements of Part B of the Act in certain circumstances and to assist in the provision of special education and related services to children with disabilities. The school district must make an on-going, good faith attempt to recruit and hire appropriate and adequately trained personnel to provide special education and related services. Para-professionals and assistants who are the most qualified individuals available must be making satisfactory progress toward completing applicable course work necessary to meet the licensing standards of certified personnel within three (3) years.

Section 1412 also requires that children with disabilities participate in state and district-wide assessments of student progress with or without accommodations as appropriate for the child. By July 1, 2000, children who cannot participate in such assessments must have alternative assessments developed for them. Note: TEA is presently working on alternative assessment instruments for use in lieu of the TAAS.

Section 1412 also specifies that a state must maintain its level of expenditures for special education and related services for children with disabilities from one year to the next. The state advisory panel also must now include representatives from private schools and public charter schools as well as representatives from the state juvenile and adult correction agencies. The majority of the members from the panel must be individuals with disabilities or parents of such individuals. The advisory panel must advise the state in implementing policies related to the coordination of services for children with disabilities. States must also monitor suspensions and expulsions of students with disabilities and take appropriate actions to modify policies and procedures if such rates are excessive.

Section 1412 also reads that states may establish their eligibility to receive Part B funds without submitting a state plan every three (3) years, if the state has on file with the Secretary policies and procedures that demonstrate that it had previously complied with the Act.

F. Section 1414. Evaluations, Eligibility and Terminations, IEPs and Placements

Provisions on evaluation in Section 1414 codify the requirement that a full and individualized initial comprehensive evaluation must be conducted before the provision of special education and related services and that the purposes of the initial evaluation are to first, determine whether a child is a child with a disability, and second, to determine the child's specific educational needs. The reauthorized IDEA specifies that the parents must provide an informed consent before the initial evaluation of a child, but that such consent shall not be construed as consent for placement for the receipt of special education and related services. If a child's parents refuse consent for evaluation, a school district may continue to pursue an evaluation by using the mediation and due process procedures under Section 1415.

The school district must use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information from the child's parents, to establish the child's eligibility and to determine the content of the child's IEP, including information relating to enabling the child to be involved in or progress in the general education curriculum. The school district must also not use any single procedure as the sole

criterion for determining a child's eligibility or for determining an appropriate educational program for the child. The school district must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and development factors.

This section also requires that upon completion of administration of tests and other evaluation materials, the determination of whether a child is a child with a disability is made by a team of qualified professionals and the parents of the child in accordance with Section 1414(b)(5) and that a copy of the evaluation report and the documentation of determination of eligibility is given to the parent. Section 1414(b)(5) states that when eligibility is being determined, a child may not be deemed to be a child with a disability if the determinant factor for such determination is lack of instruction in reading or math or a limited English proficiency.

Reevaluations are to be conducted at least once every three years or if conditions warrant a reevaluation or if the child's parents or teacher requests a reevaluation. Informed parental consent also must be obtained for reevaluations. However, informed consent need not be obtained if the school district can demonstrate that it has taken reasonable steps to obtain consent and the child's parents have failed to respond. It can be assumed that if the parents respond negatively by refusing to provide consent, the school district may use the override provisions formally necessary only for initial evaluation refusals.

Section 1414 requires that existing evaluation data on a child be reviewed to determine if any other data are needed to make decisions about a child's eligibility for services. If it is determined by the IEP team and other qualified professionals that additional data are not needed, the parents must be so notified of the determination that no additional data are needed, the reasons for it, and of the parents' right to request an evaluation. Unlike current law, however, no further evaluations will be required at that time unless requested by the parents.

G. Section 1414(D). Individualized Education Programs

This provision took effect July 1, 1998. Generally, the substantive changes which were made include the definitions of the IEP and the IEP team, a greater emphasis on participation in the general education curriculum, increased emphasis on least restrictive

environment principles, assessment of students with disabilities, transition service needs of children with disabilities, (including specific provisions for students age 14 and older), methods of assessing student's progress on IEPs and increased parental involvement.

The definition of the IEP includes all of the required elements of an IEP, beginning with a statement of a child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general education curriculum, or for a preschool child with a disability, how the child's disability affects the child's participation in appropriate activities. The IEP should also address the unique needs of the child that arise out of his or her disability that must be addressed in order for the child to progress in the general education curriculum, such as the need of a blind child to read Braille, or of a child with cognitive disabilities to receive transportation training (i.e., how to use public transportation). Once a child has been identified as being eligible for special education, the connection between special education and related services and the child's opportunity to experience and benefit from the general education curriculum should be strengthened. Congress believed that the majority of children identified as eligible for special education and related services are capable of participating in the general education curriculum to varying degrees with some adaptations and modifications. This provision was intended to ensure that children's special education and related services are in addition to and are affected by the general education curriculum, not separate from it.

Specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a child with disabilities to achieve his or her annual goals would not normally require action by the child's IEP team. However, if changes are contemplated in the child's measurable annual goals, benchmarks, short-term objectives, any of the services or program modifications or other components described in the child's IEP, the school district must ensure that the child's IEP team is reconvened in a timely manner to address those changes.

The new emphasis on participation in the general education curriculum was not intended to result in major expansions in the size of the IEP of dozens of pages of detailed goals and benchmarks or objectives in every curricular content standard or skill.

The new focus was intended to produce attention to the accommodations and adjustments necessary for children with disabilities to access the general education curriculum and the special services which may be necessary for appropriate participation in particular areas of the curriculum due to the nature of the disability.

The reauthorized IDEA requires that a child's IEP include a statement of measurable annual goals, including benchmarks or short-term objectives. It was believed by Congress that this would help parents and educators determine if the goals can reasonably be met during the year, and allow parents to be able to monitor their child's progress. The law requires that annual goals included in a child's IEP relate to "meeting the child's needs that result from the child's disability to enable the child to be involved in the progress in and progress in the general education curriculum." This language should not be construed to be a basis for excluding a child with a disability who is unable to learn at the same level or rate as other children in an inclusive classroom or program. It is intended to require that the IEP's annual goals focus on how the child's needs resulting from the child's disability can be addressed so that the child can participate, at the individually appropriate level, in the general curriculum offered to all students.

Prior to the enactment of P.L. 94-142 in 1975, the opportunity and inclination to educate children with disabilities was often in separate programs and schools away from children without disabilities. The reauthorized IDEA contains a presumption that children with disabilities are to be educated in regular classes. Therefore, the legislation requires that the IEP include an explanation of the extent, if any, to which a child with a disability will not participate with other children in the regular class and in the general education curriculum including extra-curricular and non-academic activities.

Congress recognized that every decision made for a child with a disability must be made on the basis of what that individual child needs. Nonetheless, when the decision is made to educate the child separately, an explanation of that decision will need, at a minimum, to be stated as part of the child's IEP as a result of the reauthorized IDEA.

Under current law, a child's IEP must include a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child. Congress intended that, while teaching and related services meth-

odologies or approaches are an appropriate topic for discussion and consideration by the IEP team during IEP development or annual review, they are not expected to be written into the IEP. Furthermore, Congress did not intend that changing particular methods or approaches necessitates an additional meeting of the IEP Team. The law does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

Children with disabilities must be included in state and district-wide assessments of student progress with individual modifications and accommodations as needed. Thus, the law requires that the IEP include a statement of any individual modifications in the administration of State and district-wide assessments. Congress stated that excluding children with disabilities from these assessments severely limits and, in some cases, prevents children with disabilities, through no fault of their own, from continuing on to post-secondary education. The law requires that if the IEP team determines that the child's performance cannot appropriately be assessed with the regular education assessments, even with individual modifications, the IEP must include a statement of why the assessment is not appropriate and alternative assessments must be made available. Congress reaffirmed the existing Federal law requirement that children with disabilities participate in state and district-wide assessments. This will assist parents in judging if their child is improving with regard to the child's academic achievement, just as the parents of other children do.

The law requires that the IEP include, beginning at age 14 "a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced placement courses or a vocational education program)." The purpose of this requirement was to focus attention on how the child's educational program can be planned to help the child make a successful transition to his or her goals for life after secondary school. This provision was designed to augment, and not replace, the separate transition services requirement, under which children with disabilities beginning no later than age 16 receive transition services including instruction, community experiences, the development of employment and other post-school objectives and, when appropriate, independent living skills and functional vocational evaluation.

Current law was not clear on what is required when a child with a disability attains the age of majority. In order to clarify the situation, the IEP definition in the law includes a statement that the child has been informed of his or her rights under Part B, if any, that will transfer to the child when he or she attains the age of majority. The law clarifies that when a child is considered incapable of making educational decisions, the state will develop procedures for appointing the parent or another individual to represent the interests of the child.

Additionally, the law requires that a child's IEP include a statement of how the child's progress toward the annual goals will be measured and how the child's parents will be regularly informed of the child's progress toward those goals (by such means as report cards) as often as parents are informed of their other children's progress. One method recommended by the committee would be providing an "IEP report card" with the general education report card, if the latter is appropriate and provided for the child.

The law's definition of the IEP team includes the parents of a child with a disability; at least one regular education teacher of such a child (if the child is, or may be, participating in the regular education environment); at least one special education teacher, or where appropriate, at least one special education provider of such child; a representative of the local educational agency who is (a) qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (b) knowledgeable about the general curriculum; and (c) knowledgeable about the availability of resources of the local educational agency; an individual who can interpret the instructional implications of evaluation results, who may be a member of the team; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and whenever appropriate, the child with a disability.

The law provides that the regular education teacher participate on the IEP team, but this provision is to be construed in light of the law's proviso that the regular education teacher, to the extent appropriate, participate in the development of the IEP of the child.

Related services personnel should be included on the team when a particular related service will be discussed at the request of a child's parents or the school. Such personnel can include personnel knowledgeable about services that are not strictly special

education services, such as specialists in curriculum content areas such as reading.

The law requires that, at the beginning of every school year, an IEP be in effect for each child with a disability served by a school district, a state agency, or an SEA. In the case of a child with a disability aged 3 through 5 (or at the discretion of the state educational agency, a two-year-old child with a disability who will turn 3 during the school year), an individualized family service plan may serve as the child's IEP if using that plan as the IEP is consistent with state policy and agreed to by the agency and the child's parents.

In developing a child's IEP, the law requires that the IEP team consider the strengths of the child and the concerns of the parents for enhancing the education of their child; and the results of the initial evaluation or most recent evaluation of the child. In addition, Congress believed that a number of considerations are essential to the process of creating a child's IEP. The purpose of the IEP is to tailor the education to the child; not tailor the child to the education. If the child could fit into the school's general education program without assistance, special education would not be necessary.

The law provides that, in the case of a child whose behavior impedes the learning of the child or others, the IEP team, as appropriate, shall consider strategies, including positive behavior interventions strategies and supports, to address that behavior.

Similarly, in the case of a child with limited English proficiency, the IEP team is to consider the language needs of the child as such needs relate to the child's IEP. In the case of a child who is blind or visually impaired, the IEP team must provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.

The team also is to consider the communication needs of the child in order to ensure that local educational agencies better understand the unique needs of the children who are deaf or hard of hearing. Special factors must be considered in developing IEP's for these children. The policy included in the law provides that, in the case of the child who is deaf or hard of hearing, the IEP team must consider the language and communication needs of

the child; opportunities for direct communication with peers and professional personnel in the child's language and communication mode; the child's academic level; and the child's full range of needs, including the child's social, emotional, and cultural needs and opportunities for direct instruction in the child's language and communication mode.

The law further requires that the IEP team consider the provision of assistive technology devices and services when developing the child's IEP.

The law specifies that the school district shall ensure that a child's IEP team review a child's IEP periodically, but not less than annually to determine whether the annual goals of the child are being achieved; and revises the IEP as appropriate to address: (1) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; (2) the results of any reevaluation; (3) information provided by or to the parents; (4) the child's anticipated needs; or (5) other matters. With regard to transition services in IEP's the bill provides that if any agency, other than the school district, participating in the child's education fails to provide the transition services described in the child's IEP, the school district must reconvene the IEP team to identify alternative strategies to meet the child's transition objectives.

H. Section 1415. Procedural Safeguards

The legislation adds procedures that state education agencies, state agencies, or local education agencies must establish and maintain, including procedures, related to mediation; procedures that require parents to, prior to filing a request for a due process hearing, provide the district with notice, including the name and residents of the child, and description of the nature of the problem of the child and a proposed resolution of the problem. The Texas Education Agency has developed a model form to assist parents in filing a complaint. Parents who fail to comply with these requirements may suffer a reduction of attorneys' fees if they are later found to be prevailing parties. This section also specifies that two types of notices must be sent to parents, the prior written notice and the procedural safeguards notice.

Agencies must provide prior written notice information to the parents of a child whenever there is a proposal to initiate or change, (or a refusal to initiate or change), the identification, evaluation or educational placement of the child with a provision of FAPE. The

information to be included in prior written notice includes: a description of the action proposed or refused by the agency; an explanation of why such actions are being proposed or refused; a description of other options that were considered and why those were rejected; a description of each educational procedure, record or report relevant to the agency's action; a description of other relevant factors, a statement that the parents have protection under the procedural safeguards and if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained, and sources for parents to contact or obtain assistance in obtaining these provisions.

A notice that includes information on procedural safeguards must be made available to the parents of the child with a disability upon initial referral for evaluation, upon each notification of an IEP meeting, upon reevaluation of the child, and upon registration of a complaint. This notice must include information relating to independent educational evaluation, prior written notice, parental consent, access to educational records, opportunity to present complaints, the child's placement during pendency of due process proceedings, procedures for students who are subject to placement in an interim alternative educational setting, requirements for unilateral placement by parents of children in private schools at public expense, mediation, due process hearings, state level appeals, civil action, and attorneys' fees.

A new section on mediation was included in the legislation requiring state education agencies and local education agencies to ensure that procedures are established and implemented to allow parties to resolve disputes through a mediation process. Such processes are already in existence within Texas and this provision will have little affect upon current state practice.

The new legislation requires that at least five business days prior to a hearing, each party disclose to other parties all evaluations completed by that date and recommendations associated with those evaluations that are to be used at the hearing. If any party fails to provide such information within the time periods specified in the bill, the hearing officer may bar that party from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Congress expressed concerns regarding the relationship between the extent of success a parent achieves at a due process hearing and the amount of attorneys' fees a court may award. In

addressing this issue, Congress believed that the amount of any award of attorneys' fees to a prevailing party under Part B should be determined in accordance with the law established by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

In *Hensley*, the Supreme Court held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorneys' fees. The Supreme Court held that where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorneys' fees reduced simply because the District Court did not adopt each contingent raised. But where the plaintiff achieved only limited success, the District Court should only award that amount of fees that is reasonable in "relation to the results obtained."*Id.* Congress believed that the IEP process should be devoted to determining the needs of the child and planning for the child's education with parents and school personnel. To that end, the bill specifically excludes the payment of attorneys' fees for the parents' attorney's participation in IEP meetings unless such meetings are convened as a result of an administrative procedure or judicial action.

The new legislation also adds language that allows a state to require that when a child with a disability reaches the age of majority, the public agency shall provide a notice to both the individuals and parents transferring all rights accorded to parents to the child, notify the individual and parents of the transfer of rights, and transfer all rights accorded to parents of children who are incarcerated in an adult or juvenile correctional institution. For children who have reached the age of majority who have not been determined to be incompetent, but who are determined not to have the ability to provide informed consent with the respect to the educational program of the child, the state will establish procedures for the appointment of the parents of the child, or if not available, of another appropriate individual to represent the educational interests of the child.

I. Section 1415. Discipline

The legislation added substantial provisions regarding the discipline of children with disabilities. Provisions allow school personnel to order a change in the placement of a child with a disability to an appropriate interim alternative education setting, another setting, or suspension, for not more than 10 school days (to the extent such alternative would be applied to children without disabilities). A child that carries a weapon to school or to a school function, or who possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function can be placed in an alternative educational placement (AEP) for the same amount of time that a child without a disability would be subject to discipline, but not more than 45 days.

The law requires that either before or not later than 10 days after taking the disciplinary action, the school district convene an IEP meeting to develop an assessment plan to address the problem behavior (if the school district did not conduct a functional behavior assessment and implement a behavior intervention plan for the child before the problem behavior), or if the child already has a behavior intervention plan, the IEP team will review the plan and modify it, as necessary, to address the behavior. A hearing officer may order a change in placement of a child with a disability to an alternate setting for not more than 45 days if the officer determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of a child is substantially likely to result in injury to the child or to others, considers the appropriateness of the current placement, considers whether the agency has made reasonable efforts to minimize the risk of harm in the current placement (including the use of supplementary aids and services), and determines that the setting meets the requirements. The legislation requires that AEP to be determined by the IEP team and to be selected so as to enable the child to continue to participate in the general curriculum, continue to receive services and modifications that will enable the child to meet the goals in the IEP, and include services and modifications designed to address the problem behavior.

If a disciplinary action is contemplated as a result of drugs, alcohol, or injury to self or others, or if a disciplinary action involving a change of placement for more than 10 days is

contemplated for a child with a disability who had engaged in other behavior that violated any rule or code of conduct: (1) not later than the date on which the decision to take action is made, parents must be notified of the decision and of all procedural safeguards; and (2) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review must be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action. The review is to be conducted by the IEP team and other qualified personnel.

In order to find that the behavior was not a manifestation of the disability, the team must determine: (1) that the child's IEP and placement were appropriate and that special education services supplementary aids and services and behavior intervention strategies were provided consistent with the IEP and placement; (2) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior; and (3) the child's disability did not impair the ability of the child to control the behavior. If it is determined that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedure applicable to children without disabilities may be applied to the child in the same manner in which that would be applied to children without disabilities, except that they will continue to receive a free appropriate public education.

The law allows parents who disagree with a determination that the child's behavior was not a manifestation of the disability to request a hearing, and for TEA or the school district to arrange for an expedited hearing. During the appeal, the child shall remain in the setting pending the decision of the hearing officer or until the expiration of the time limit, whichever occurs first, unless that parent and the SEA or school district agree otherwise. If a child is placed in an AEP and school personnel propose to change the child's placement after expiration of the period of the placement, the child shall remain in the current placement (prior to the AEP) during the pendency of any proceeding to challenge the proposed change in placement, unless school personnel maintain that it is dangerous for the child to be in the current placement, in which case the school district may request an expedited hearing.

A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated any rule or code of conduct of the school district,

may assert any of the protections if the school district had knowledge that the child had a disability before the behavior occurred. If the school district did not have knowledge that the child had a disability, the child may be subjected to the same disciplinary measures as applied to children without disabilities. The school district will be considered to have knowledge of the disability if: (1) the parent has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance) to personnel of the appropriate educational agency that the child is in need of special education and related services; (3) the parent has requested an evaluation of the child; or (4) the teacher, or other personnel of the school district, has expressed concern about the behavior or performance of the child to the director of special education or to other personnel of the agency.

If a request is made for an evaluation of a child during the time in which the child is subjected to disciplinary measures, the evaluation shall be conducted in an expedited manner. If the child is determined to have a disability, the agency shall provide special education and related services.

The legislation clarifies that nothing prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to crimes committed by a child with a disability. An agency that reports a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the authorities.

V. CONCLUSION

Statutes mandating the provision of educational services to children with disabilities have been one of the greatest achievements of state and federal legislation. All children have benefited greatly from the inclusion of students with disabilities in the regular classrooms. Students who cannot be served in the regular classroom may receive appropriate programming in alternative settings. School districts have worked admirably alongside parents and advocate organizations to insure that legal rights are upheld and public responsibilities are fulfilled.

The gains of students with disabilities, however, in the area of public education have not come without some costs, both monetary and otherwise. The federal government has yet to fulfill its

original intent of assuming a much greater share of the funding of the Act's mandates. The due process procedures mandated under the Act have too often turned districts and parents into adversaries, when joint cooperation might have resulted in more positive results. With the advent of the Handicapped Children's Protection Act of 1990, parents may now receive attorneys' fees if they prevail in their legal disputes with school districts concerning their children with disabilities. This change in the law has created greater access to the due process procedures for many parents who were otherwise excluded from asserting their rights. The possibility of attorneys' fee awards, unfortunately, has also spawned a new generation of "disability rights advocates," sometimes more motivated by the possibility of personal financial gain than by obtaining rights for their clients under the Act.

For many of these reasons, changes to the IDEA were made by Congress, including greater emphasis on mediation and sanctions imposed upon parties who unnecessarily resist reasonable settlement of disputes or protract litigation. The reauthorization of the IDEA will no doubt bring additional changes to the educational rights of children with disabilities and the responsibilities of public school districts. Despite the fine-tuning which may be necessary, however, what is "good" about the IDEA far outweighs what is "bad." As Dostoevsky asserted long ago, the measure of a civilization is found in how equitable it treats its least fortunate members. School districts can take pride in implementing what is surely the most comprehensive, responsible, and civilized public system of educating children with disabilities in history.

SEXUAL ABUSE OR HARASSMENT OF STUDENTS

By: Raymond L. Gregory

I. Introduction

Schools were once regarded as safe havens for students, where a student's greatest fears were crossing the school bully and not having a date to the prom. Those times are long gone. In present times, students fear for their physical well-being as gangs and weapons become commonplace. Even more distressing are acts of sexual abuse or harassment perpetrated on unwitting students by school employees or fellow students. As a result, students who are subjected to sexual abuse or harassment are increasingly suing school districts, supervisory officials in addition to the perpertrator of the abuse.

The following scenarios are typical of behavior that can lead to litigation. In the first scenario, a student is befriended by a school teacher. The teacher's interest in the student deepens and an amorous relationship commences. After the breakup of the relationship several months later, the student and the student's family sue the school district, district supervisory officials, and the teacher, alleging the violation of federal law. In the second scenario, a student regularly rides the school bus to campus. Over the course of the school year, a student of the opposite sex begins to taunt the student with sexually suggestive comments. Offended by the comments, the student reports the abuse to the bus driver, who fails to control discipline on the bus. Eventually, the taunting rises to such a level that the student is ostracized by other students and is forced to stop riding the bus. The student and student's family sue the school district and supervisory officials for violation of federal law.

Litigation in this area raises several interesting questions, as courts attempt to balance the rights of students against the supervisory demands placed on school officials. Can school districts be held liable for the actions of their students, over whom school officials exercise only minimal control? Furthermore, can school districts and supervisory officials be held liable for the actions of their employees, particularly when employees step over the line and commit acts of sexual abuse toward students? This chapter will review the recent litigation in this area, with an emphasis on

cases that speak specifically to sexual abuse or harassment perpetrated by employees and students in the school environment.

II. Employee-to-Student Abuse or Harassment

A. Claims Under Section 1983

1. Background of Litigation Under Section 1983

Most of the reported cases involving the sexual abuse or harassment of students by employees arise under 42 U.S.C. § 1983 ("Section 1983"). Section 1983 is the federal statute that provides recourse for an individual who has suffered a deprivation of his or her constitutional or statutory rights at the hands of persons acting under color of state law.[1] To recover under section 1983, the plaintiff must prove two elements:

(a) the conduct complained of was committed by a person acting under color of state law
(b) the conduct deprived the plaintiff of rights, privileges, and immunities secured by the Constitution and laws of the United States.[2]

Section 1983 is used in a variety of suits brought against governmental entities and officials, including school districts and school employees. A school employee who engages in unwelcome sexual relations with a student is subject to Section 1983 liability, because that type of conduct violates the student's right to bodily integrity recognized under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[3] In addition to targeting the employee/perpetrator, however, the resulting lawsuits generally target school districts, high-level school administrators, and other potential "deep-pocket" defendants. The relevant question, thus, is whether these entities and officials can be held liable for their subordinates' deprivation of a student's constitutional rights.[4]

2. A School District's Liability Under Section 1983 For The Acts of Its Employees

In a line of cases beginning with *Monell v. Department of Social Services*,[5] courts have refused to impose strict liability against governmental entities for the wrongful acts of their employees.[6] This line of reasoning was affirmed by the United States Supreme Court in *Jett v. Dallas Indep. Sch. Dist.*[7] Thus, a local governing body cannot be held liable for constitutional violations merely because one of its employees committed an illegal act. To be held liable under Section 1983, a school district must have somehow permitted or furthered the illegal act through its own policies or practices.[8]

A Section 1983 plaintiff must prove that the injury was caused by a person acting under color of state law, and that the injury constituted a deprivation of a constitutional right. To prevail against a governmental entity, such as a school district, the plaintiff bears the burden of establishing that the violation was caused by an unconstitutional policy or custom sanctioned by governmental officials who have final policy-making authority.[9] This requirement means that a plaintiff must establish that the school district's governing board actually adopted an unconstitutional policy, or that the school board otherwise knew about or acquiesced in a deeply imbedded custom or practice that resulted in a constitutional violation.[10]

a. Liability In Cases Involving Sexual Abuse Or Harassment

The leading case regarding school district liability in situations involving sexual abuse or harassment of students by employees is *Gonzalez v. Ysleta Indep. Sch. Dist.*[11] In that case, a student complained of sexual abuse by her teacher, and the complaints were specifically considered by the local school board. As a result of the complaints, the school district conducted an investigation, transferred the teacher to a new campus, and directed the teacher to seek counseling. About two years after the transfer, the teacher sexually assaulted another student. Thereafter, the teacher was convicted on charges of indecency with a child and ultimately was fired from his job.

The second student later filed a civil suit against the school district. At trial, the jury found in favor of the student and awarded her damages of $500,000.00. The school district argued in a post-

verdict motion, which ultimately was denied, that it was liable for the student's injuries only if the decision made by the school board (i.e., to order the teacher to seek counseling and to transfer the teacher) manifested deliberate indifference to the constitutional rights of the child.

On appeal, the United States Court of Appeals for the Fifth Circuit held that under *Jett v. Dallas Indep. Sch. Dist.* and other prevailing authorities, the school district's board of trustees was responsible for determining school policy.[12] The Fifth Circuit also held that the school board's conscious decision to transfer the teacher, as opposed to employing other disciplinary techniques, was a policy decision attributable to the school district. The school district argued that, nevertheless, the plaintiff had the burdensome requirement of proving that the school board deliberately chose measures that would prove inadequate. Thus, under the school district's reasoning, Section 1983 would provide a remedy only if the school board's decision was made with deliberate indifference to the student's constitutional rights.

The Fifth Circuit agreed with the school district and held that Gonzalez' claim required a showing of deliberate indifference prior to holding the district liable for any allegedly mistaken personnel decision: "We do hold, however, that YISD may be held liable in this case only if the Board of Trustees' decision to transfer [the teacher] to [the student's] elementary school manifested a deliberate indifference to the welfare of school children."[13]

The court went on to conclude that the trial evidence was insufficient to sustain the jury's verdict under this standard.

The bottom-line result of *Gonzalez* and other cases dealing with sexual abuse of students by employees is that a plaintiff must demonstrate deliberate indifference by the local school board as a basis for recovery under Section 1983.[14] To avoid liability under Section 1983, school districts should be able to demonstrate that they are not deliberately indifferent to the rights of their students. The safest and easiest way to accomplish this goal is to take every report of sexual abuse or harassment seriously and conduct a thorough investigation of each reported incident.

b. Liability For Failure To Properly Train

Many plaintiffs in cases involving sexual abuse or harassment also assert a failure to train cause of action under section 1983. Typically, plaintiffs will allege that the school district failed to train

its students, teachers, and administrators in the reporting and investigation of sexual abuse or harassment, knowing that this failure to train would lead to a violation of students' constitutional rights.

Courts have recognized failure to train claims under Section 1983 since the United States Supreme Court's decision in *City of Canton v. Harris*.[15] In that case, the Supreme Court held that a municipality may be held liable under Section 1983 based on failure to train its employees. The Court further held, however, that such liability will be imposed only where the failure to train amounts to deliberate indifference to the rights of the citizens affected. Two cases involving failure to train claims brought against school districts are *Thelma D. v. Board of Educ.* and *Jane Doe A. v. Special Sch. Dist.*

In *Thelma D.*,[16] the plaintiffs contended that the local school board customarily failed to fund training for the detection and investigation of alleged incidents of child abuse. The United States Court of Appeals for the Eighth Circuit, relying on *City of Canton v. Harris*, held that the plaintiffs had the burden of establishing that the school board knew its procedures were inadequate and would likely result in a violation of students' constitutional rights. In rejecting the plaintiffs' claims, the Eighth Circuit recognized that the school district had developed and implemented policies and procedures for handling complaints of sexual abuse. Furthermore, the school district had implemented various programs to instruct principals on laws and reporting procedures, and to train school employees in detecting and investigating incidents of child abuse. Also, the school district employed social workers trained in the detection and prevention of child abuse. Based on this evidence, the court concluded that the plaintiffs had not sufficiently established deliberate indifference on the part of the school board to impose liability based on a failure to train theory.[17]

In *Jane Doe A.*,[18] the plaintiff argued that the school district was guilty of deliberate indifference to the rights of handicapped children due to an inadequate training program for bus drivers, teachers, supervisors, and bus aides with respect to child abuse. The Eighth Circuit held that the plaintiffs failed to raise a material fact issue of deliberate indifference, and absolved the district on the failure to train claim.

To avoid Section 1983 liability based on failure to train, school districts should enact policies for reporting and investigating incidents of alleged sexual abuse or harassment, design and enact programs to train their students in the reporting of sexual abuse

and harassment, and, design and enact programs to train their teachers and administrators in the reporting and investigation of sexual abuse and harassment. All school personnel should be periodically reminded of their obligation to report any suspected child abuse to the authorities in accordance with the requirements of the Texas Family Code.

3. Supervisory Officials' Liability Under Section 1983

In addition to suing school districts for violation of Section 1983, plaintiffs typically sue high-level school administrators, such as superintendents and principals. The leading case in this area is *Doe v. Taylor Indep. Sch. Dist.*,[18] wherein the United States Court of Appeals for the Fifth Circuit established the legal standard for finding a supervisor liable under Section 1983 for the wrongful conduct of a subordinate.

To recover from supervisory officials, a plaintiff must establish that:

(a) The defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing a student.
(b) The defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was necessary to prevent or stop the abuse.
(c) The defendant's failure to take action caused a constitutional injury to the student.[20]

In *Doe v. Hillsboro Ind. Sch. Dist.*,[21] a female student sued school officials after she was raped by a school custodian. The student alleged the district's inadequate hiring procedures and failure to adequately check the custodian's criminal background resulted in her being raped. In holding for the school district, the court distinguished *Hillsboro* from *Doe v. Taylor* when it stated that compulsory school attendance laws did not create a special relationship between students and school districts and there was no duty imposed on district to protect students.[22]

Additionally, courts have refused to find school officials or school districts liable in sexual assaults or harassment cases even if the violator and/or victim is affiliated with the district in question.[23]

To avoid individual liability under Section 1983, supervisory school officials should take every report of sexual abuse or harassment seriously and conduct a thorough investigation of each reported incident. Both the report and the investigation should be documented in writing. Following each investigation, supervisory officials should take whatever action is necessary to prevent or stop the abuse. Possible actions can range from an official directive to cease the offensive conduct to the initiation of termination proceedings.

B. Claims Under Title IX

1. Evolution Of Title IX Claims

In addition to claims under Section 1983, most of the reported decisions involving sexual abuse or harassment of students, particularly the more recent cases, involve claims under Title IX of the Education Amendments of 1972.[24] Title IX claims stem from the United States Supreme Court's decision in *Franklin v. Gwinnett County Pub. Schs.*,[25] wherein the Court held that Title IX provides a damages remedy, in limited cases, for sexual harassment and abuse of students. The Court in Franklin held that a student's ability to recover monetary damages in Title IX cases is limited to those cases where the student can show intentional, gender-based discrimination by the local school board. Recently, the Supreme Court held that damages are not recoverable in a Title IX implied right of action unless a school official with authority to institute corrective measures knew of the sexual assault or harassment and was deliberately indifferent to the offender's conduct.[26] Presently, especially after the *Lago Vista* decision, most courts are finding in favor of school districts in Title IX suits concerning school district liability for the sexual abuse or harassment by their employees and teachers.

2. History of Title IX

The United States Congress enacted Title IX[27] pursuant to the Spending Clause in the United States Constitution to banish gender-based discrimination in educational programs and activities receiving federal financial assistance. Legislation enacted under the Spending Clause is in the nature of a contract: in return for

federal funds, the various states agree to comply with federally imposed conditions.[29] Because the receipt of federal funds is consensual, not mandatory, the United States Supreme Court has held that the recipient of federal funds should not be held liable for damages absent notice that it is committing some act in violation of the federal requirements.[30] In reaching this conclusion, Justice White noted that courts must recognize and respect the privilege of a recipient to withdraw from a program and terminate its receipt of funds rather than assume the further obligations and duties imposed by the courts.[31]

The legislative history and text of Title IX demonstrate that its purpose is to prohibit institutional practices of gender-based discrimination.[32] During floor debates, representatives spoke of discriminatory policies.[33] The Supreme Court explained that Congress "wanted to avoid the use of federal resources to support discriminatory practices."[34] Similarly, in *Floyd v. Waiters*,[35] the court held that the language of Title IX is aimed at discrimination in a "program or activity," not random assaults.

As can be seen from the text and history of Title IX and its regulations,[36] Title IX does not unambiguously create a damages remedy for employee-to-student harassment. There is no authority or legislative history demonstrating that Congress intended to expose school districts to unlimited liability based on the unauthorized acts of an unlimited pool of potential tort-feasors (i.e., all district employees and students). Nevertheless, the *Franklin* decision indicates that students may sue school districts for damages under Title IX for acts of sexual abuse or harassment. For an excellent discussion of the various proposed standards of liability under Title IX, see the Seventh Circuit's recent decision in *Smith v. Metropolitan School District*.[37]

3. School District Liability Under Title IX For Sexual Abuse Or Harassment

To remain true to the history and intent of Title IX, a Title IX plaintiff must demonstrate intentional, gender-based discrimination by the school district.[38] According to the Supreme Court, this is accomplished by showing that a school official with supervisory or corrective authority over the offending employee had actual notice of sexual harassment or abuse and that the official deliberately ignored the misconduct.[39] As the court explained in *Howard v. Board of Educ.*, the "threshold" issue in a Title IX lawsuit is

whether the entity receiving the federal aid actually participated in the discriminatory act:

> Absent knowledge or direct involvement by the school or educational agency, it is difficult to characterize any form of sexual discrimination as an authorized program or activity of the school. Moreover, it is difficult to imagine that Congress intended to open schools and educational agencies to virtually unlimited liability based on the conduct of their employees.[40]

To meet the intentional discrimination standard, a Title IX plaintiff must show that an official who has the authority to institute corrective measures has actual notice of the conduct and deliberately ignores it.[41] It is insufficient for the plaintiff merely to show that the institution knew or should have known of the sexual harassment and failed to take appropriate corrective action.[42]

In post-*Franklin* decisions addressing whether sexual abuse or harassment of students by employees violates Title IX, courts have refused to impose liability without a showing of intentional discrimination by the local school board. For example, in *R.L.R. v. Prague Public Sch. Dist.*, the court held that the plaintiff, an eighth grade student who was sexually involved with her coach, could not prevail under Title IX because she did not present any evidence showing a pattern of discrimination, much less intentional discrimination.[43] Likewise, in *Floyd v. Waiters*, the court refused to impose liability against the school district because even if the actions of two security guards in assaulting students constituted sexual discrimination, the local school board was not involved in the discrimination. Therefore, the court could not find intentional discrimination by the district's decision-maker.[44] In *Rosa H. v. San Elizario Indep. Sch. Dist.*,[45] a teacher engaged in a consensual sexual relationship with a minor female student. After discovery of the relationship by the student's parents, the student was immediately removed from the school. Shortly afterwards, the student and her parents filed suit against the district and several district officials alleging Title IX violations. In finding for the district, the Fifth Circuit rejected a strict liability theory for school districts whose teachers or employees abuse or harass students. The court in *Rosa H.* summarized its decision by stating that "school districts are not liable in tort for student-teacher sexual harassment under Title IX unless an employee who has been invested by the

school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so."[46] In *Doe v. Petaluma City Sch. Dist.*, the court rejected the plaintiff's argument that she need only show that the district knew or should have known of discrimination against her. The court dismissed the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12 because there were no allegations of intentional discrimination by the school board. Thus, the plaintiff had failed to plead a cause of action.[47]

While the lower courts have often found for school districts in Title IX cases, they have nevertheless struggled with establishing a consistent standard for imposing liability against school districts for sexual abuse and harassment by their employees.[48] However, the recent decision by the U.S. Supreme Court in *Gebser v. Lago Vista Indep. Sch. Dist.* clarified this issue and will help district officials plan appropriate policies for teacher to student sexual harassment. *Lago Vista* involved an eighth grade female student who had a sexual relationship with a teacher for several months that ended when they were discovered by police engaging in sexual intercourse. The teacher was immediately fired by the district and his teaching license was revoked by the Texas Education Agency. Shortly thereafter, the student and her mother filed suit under Title IX against the district. In finding for the district, the U. S. Supreme Court held in a 5-4 decision that a school district official with the authority to institute corrective measures must have actual notice of the sexual abuse or harassment and be deliberately indifferent about the misconduct before Title IX liability can attach.[48] It is clear, therefore, that to recover under Title IX, a plaintiff must meet the significant burden of showing intentional, gender-based discrimination by the local school board. The decision in Lago Vista should make decisions for lower courts in future Title IX sexual abuse cases easier to adjudicate.

4. Common Law Agency Principles Do Not Apply

Many plaintiffs claim that courts should, in determining whether school districts are liable for the sexual abuse or harassment of students by employees, follow the procedures and standards of Title VII of the Civil Rights Act of 1964.[50] Under Title VII, common law agency principles govern when an employer is liable for sexual abuse or harassment committed by its employees. However, logic and prevailing law dictate that Title VII principles do not apply to Title IX cases.[51]

While isolated decisions have applied Title VII principles in Title IX cases, differences in the statutes preclude wholesale adoption of Title VII standards in a Title IX case. First, Title VII defines "employer" to include the employer's "agents."[52] Conversely, Title IX prohibits discrimination on the basis of sex under an education "program or activity" receiving federal financial assistance.[53] The statutory definition of "program or activity" relates to operations, not personnel.[54]

Second, Title VII places a statutory ceiling on damages.[55] In contrast, Title IX contains no statutory limitation. If the typical plaintiff's analysis of Title IX liability were adopted, financially strapped school districts could face greater exposure under Title IX than large corporations face under Title VII.

Third, a Title VII plaintiff in Texas must bring an administrative claim within 300 days of the discriminatory act. This protects employers from having to defend against stale claims. In contrast, Title IX contains no statute of limitations; rather, students are subject to the personal injury limitations period created by state law. In Texas, the two-year limitations period is tolled for minors until they reached the age of majority.[56] Thus, for example, a high school girl who alleges harassment by a classmate would be able to file a Title IX claim against her school district up until her 20th birthday, long after the 300-day limitation under Title VII expired.

Fourth, Title VII has a series of regulations that relate to sexual harassment in the work-place.[57] Title IX does not have similar regulations relating to the classroom. Comparing the regulations, it is apparent that Title VII principles are not intended to be transferred into Title IX litigation.

In short, the generous Title VII liability standard is tempered by numerous provisions that protect the employer from stale claims and unlimited liability. In contrast, while Title IX lacks features such as a cap on damages, the standard for obtaining damages is higher.

5. Individual Liability Under Title IX

While many plaintiffs in cases involving sexual abuse and harassment assert claims against individual defendants, a majority of the cases addressing the issue have concluded that Title IX does not authorize a cause of action against individuals.[58] The court's reasoning in *Doe v. Petaluma City Sch. Dist.* is particularly instructive.

In *Doe*, a junior high student brought an action against the school district, a school counselor, and the principal, alleging the defendants failed to stop sexual harassment of the student by her peers. The court held that there is no cause of action against individuals under Title IX and, therefore, dismissed the plaintiff's Title IX claims as to the school counselor and principal. The court reasoned that because Title IX "prohibits discrimination against beneficiaries in programs and activities that receive federal financial assistance, . . . it is the educational institution that must be sued for violations of Title IX."[59] The court further asserted that the "fact that administrative enforcement is directed at the institution that receives federal funds suggests that the private right of action is similarly confined to actions against the institution."[60]

Even more instructive is the Seventh Circuit's recent decision in *Smith v. Metropolitan Sch. Dist.* *Smith* concerned a female high school senior who sued the school district and school district officials after she had a consensual sexual relationship with her swim coach.[61] Smith held that although public entities may be sued for money damages for acts of intentional discrimination, individual government employees may not.[62] *Smith* contains an excellent and detailed discussion of the history of Title IX as well as the OCR's guidelines for Title IX. The majority of cases presented with a Title IX cause of action against an individual have found no such liability.

III. STUDENT-TO-STUDENT HARASSMENT

A. Claims Under Section 1983

1. School District's Liability Under Section 1983 For The Acts of Its Students

As in cases of employee-to-student harassment or abuse, a plaintiff alleging student-to-student harassment in violation of Section 1983 must prove that injury was caused by a person acting under the color of state law and that the injury constitutes a deprivation of rights, privileges, or immunities secured by the U.S. Constitution or federal law.[63] To prevail against the school district, the plaintiff must show that the violation was caused by an unconstitutional policy or custom sanctioned by governmental of-

ficials who have final policy-making authority.[64] As noted earlier, this requirement means that a plaintiff must establish that the school district's governing board actually adopted an unconstitutional policy, or that the school board otherwise knew about or acquiesced in a custom or practice that led to a constitutional violation.[65]

a. Generally, There Is No State Action In Cases of Student-To-Student Harassment

Section 1983 imposes liability upon defendants who intentionally deprive a plaintiff of his or her constitutional rights while the defendant is acting under color of state law. The "under color of state law" requirement is jurisdictional and limits the reach of federal judicial power.[66] The lack of state action dooms most plaintiffs' claims in cases of student-to-student harassment or abuse.[67] Numerous courts have held, in fact, that school officials are not constitutionally responsible for violence against students by non-state actors.[68]

b. Courts Do Not Impose A Legal Duty On School Districts To Protect Students From Other Students

Despite many arguments to the contrary, the courts have found that school districts do not have a constitutional duty to protect students from harm inflicted by third parties.[69] Courts look to *DeShaney v. Winnebago County Dep't of Social Servs.*, for precedent on this issue. In *Deshaney*, the plaintiffs alleged that a state social worker negligently placed a boy with his abusive father, who battered the boy nearly to the point of death. On final disposition of the case, the United States Supreme Court held that the state defendants could not be held liable for failing to protect an individual from private violence, even though the social workers allegedly facilitated the violence. The Court reasoned that due process means a restraint on governmental power, not a guarantee of safety or an affirmative duty to protect citizens from each other. The only exception to this rule arises when the state takes a person into its custody against the individual's will and actually restrains that person's personal liberty (e.g., imprisonment or involuntary commitment to a mental hospital).

In cases of student-to-student harassment or abuse, the alleged perpetrators are private actors akin to the abusive father in

DeShaney; it is they, not school officials, who allegedly harmed the plaintiffs.[70] Two post-*Deshaney* decisions from the United States Court of Appeals for the Fifth Circuit address this issue. In *Johnson v. Dallas Indep. Sch. Dist.*,[71] the court held that the school district could not be held liable for the shooting death of a student at a school dance by another student. In *Walton v. Alexander*,[72] the court held that a school superintendent could not be held liable under section 1983 to a student who resided in a residential school for the deaf and who was allegedly raped twice by a classmate.

Some plaintiffs have attempted to circumvent *DeShaney* and its progeny by arguing that public school students are akin to incarcerated prisoners, i.e. compelled to attend school, and that schools, like prisons, should have an affirmative duty to protect students based on the custodial relationship doctrine. This analogy has not been embraced by the courts. As stated in *DeShaney*, a state's affirmative duty to protect individuals who are incarcerated arises from the actual physical limitations that the state has imposed on their freedom to act.[73] The public schools of Texas have not so restrained the personal liberty of their students that the students can be compared to prisoners. Students (and their parents) have choices about where to live, where to go to school, and how to travel to school. In fact, in *Walton v. Alexander*, the Fifth Circuit Court of Appeals rejected a "special relationship" argument, even though the student attended a residential school for the deaf and lived in the school's dormitory:

> Although Walton's freedom was curtailed, it was he who voluntarily subjected himself to the rules and supervision of the school officials. Walton's willful relinquishment of a small fraction of liberty simply is not comparable to that measure of almost total deprivation experienced by a prisoner or involuntarily committed mental patient . . . [E]xtending the Due Process Clause to impose on the state the obligation to defend and to pay for the acts of non-state third parties is a burden not supported by the text or history of the Clause, nor by general principles of constitutional jurisprudence.[74]

Consistent with the Fifth Circuit's analysis in Walton, numerous courts have rejected the argument that public schools have a special relationship toward their pupils giving rise to an affirmative constitutional duty to protect.[75]

In short, there is no constitutional right to be protected from peer violence. *DeShaney* and its progeny make it clear that the state's knowledge that a person may be in danger does not create a duty to intervene. This reasoning was used in *Graham v. Independent Sch. Dist. No. I-89*,[76] where the plaintiffs alleged that their son was murdered at school by another student with a gun and that school officials knew that the other student was dangerous and possessed a gun. Applying *DeShaney*, the court held that "foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship."[77]

2. Supervisory Officials Liability Under Section 1983

As in cases of employee-to-student abuse or harassment, plaintiffs alleging student-to-student harassment typically join high-level school administrators as defendants. The prevailing law in this area is *Doe v. Taylor Indep. Sch. Dist.*[78] While Doe is not directly on point in cases of student-to-student harassment, the Fifth Circuit reasons that to recover a plaintiff must establish that:

(a) The defendant learned of facts or a pattern of inappropriate sexual harassment pointing plainly toward the conclusion that the student was sexually harassing another student; and,
(b) The defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was necessary to prevent or stop the harassment; and,
(c) The defendant's failure to take action caused a constitutional injury to the student.[79]

As in Section 1983 cases involving allegations of employee-to-student abuse or harassment, supervisory officials can avoid Section 1983 liability for student-to-student harassment by taking every report of student-to-student sexual harassment seriously and conducting a thorough investigation of each reported incident. Following each investigation, supervisory officials should take whatever action is necessary to prevent or stop the abuse. Possible actions can range from separating the students to expulsion of the offending student.

B. Claims Under Title IX

In addition to claims under Section 1983, most of the reported decisions involving sexual harassment of students by other students assert claims under Title IX. As in cases brought by students alleging abuse or harassment by district employees, plaintiffs alleging violations of Title IX resulting from student-to-student harassment base their claims on the recent United States Supreme Court decision in *Franklin v. Gwinnett County Pub. Schs.*[80] However, in contrast to the cases involving employee- to-student abuse or harassment, the law in cases involving student-to-student harassment is clearer and more favorable to school districts.

In April 1996, the United States Court of Appeals for the Fifth Circuit, in *Rowinsky v. Bryan Indep. Sch. Dist.*,[81] held that students may not recover money damages from school districts under Title IX for sexual harassment caused by other students. The Fifth Circuit opinion comports with a 1997 decision from the United States Court of Appeals for the Eleventh Circuit, which held that students may not sue under Title IX for peer harassment.[82] The *Davis* decision has been appealed to the United States Supreme Court.

In *Rowinsky*, two female junior high school students alleged that boys on the school bus physically and verbally harassed them. The girls alleged that they reported their complaints to school officials and that the officials allegedly took no effective action. The school district's summary judgment evidence demonstrated that the boys at issue were punished. The girls subsequently brought suit under Title IX. The students argued that Title IX protects them from abuse inflicted by fellow students. The district court rejected the students' claim, and the Fifth Circuit, in a two-to-one decision, affirmed.

In *Davis*, a fifth grade female student alleged eight separate instances of sexual harassment and abuse against a classmate. The alleged abuse included unwanted physical touching accompanied by verbal harassment. On several occasions, the student complained to teachers, coaches and the principal about the abuse. However, despite the complaints, the student claimed the teachers and principal did nothing to prevent future incidents, and consequently, the alleged harassment and abuse continued. Eventually, the female student filed suit against the school district under Title IX. The district court dismissed the suit for failure to state a claim upon which relief could be granted, but the Eleventh Circuit reinstated the abused student's Title IX claim. However, after

a rehearing, the Eleventh Circuit reversed its prior decision and held that the fifth grade student failed to state a valid Title IX cause of action. While the court admitted that the student had valid tort claims against the student under state law, they also stated that "nothing in the language or history of Title IX suggests that Title IX imposes a liability for student-student sexual harassment."[83] The court reasoned that allowing such claims would lead to "whip-saw" liability for the school districts as well as the virtual certainty of extensive litigation costs and disruptions in the educational process.[84]

In *Rowinsky*, the Fifth Circuit acknowledged that Title IX provides a monetary remedy to students who are subjected to intentional sexual discrimination. The court, however, distinguished discrimination caused by school officials from discrimination caused by fellow students. Focusing on the history and wording of the statute, the court held that Title IX does not encompass discrimination by third parties. The court examined Title IX's legislative history, including debates on the Senate floor, which showed that the sponsors of the bill were concerned about institutional practices and policies, such as discriminatory admissions policies. "The drafters of Title IX recognized that it was not a panacea for all types of sex discrimination," the court wrote. The court implied that Congress could amend Title IX in the future if Congress desires to broaden its scope.

The court concluded by holding that a student could pursue a Title IX action only if the student could establish that the school district responded to sexual harassment claims differently based on sex: "Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." The court indicated that such evidence was lacking in the *Rowinsky* case.

To prove intentional, gender-based discrimination by the school board, as contemplated by the *Rowinsky* court, plaintiffs in student-to-student misconduct cases must prove more than just a failure by school officials to respond to the misconduct. Intentional discrimination means that the plaintiff must establish objective facts tending to demonstrate that, but the plantiff's gender, school officials would have responded differently. Several cases demonstrate what plaintiffs must show.

For example, in *Pfeiffer v. School Bd. for Marion Center Area*,[85] the Title IX plaintiff alleged that her dismissal from the National

Honor Society for premarital sexual activity was discriminatory because a similarly situated boy was not dismissed. The court held that evidence concerning the boy was relevant to the claim of disparate treatment.

In contrast, in *Seamons v. Snow*,[86] the student was unable to show that his gender made a difference. In *Seamons*, a student named Brian was subjected to a hazing incident while he was naked in a locker room. The incident was videotaped. Brian allegedly was told that "boys will be boys." Football season was canceled for the remainder of the year, which allegedly increased student hostility toward Brian. The football coach publicly showed hostility toward Brian. The student brought a Title IX claim, alleging a "hostile environment." The district court concluded that Brian's allegations — failure to adopt a grievance procedure and failure to discipline the football coach — did not support the claim that the defendants were motivated by an intent "to treat Brian negatively because he is a boy." The district court also rejected Brian's "hostile environment" theory and concluded that it was "inappropriate" to apply Title VII law: "Title IX does not expressly create a cause of action based on negligence for hostile environment. It would be inappropriate for this Court to import the hostile environment sexual harassment from Title VII into this Title IX action."[87]

In *Yusuf v. Vassar College*,[88] the male plaintiff, a college student, alleged that he received a stiffer penalty for sexual harassment than his roommate received for assault. The court held that discipline is discriminatory if (a) the student is innocent but is found guilty because of his gender, or (b) if the student is the victim of selective enforcement. The student must allege, however, specific facts raising an inference that gender bias was a motivating factor. "Such allegations might include . . . statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender."[89] The court emphasized that it "did not believe that Congress meant Title IX to impair the independence" of schools in disciplining students. The court ultimately concluded that the plaintiff had stated a claim under the first theory (i.e., that gender had affected the outcome of the hearing).

In *Ruh v. Samerjan*,[90] an affair between a male college professor and a female student ended badly, and the student filed several complaints that were not resolved to her satisfaction. In rejecting the student's claim of intentional gender discrimination, the court stated:

> There is no support . . . to justify a finding that the university defendants would have acted differently if a female, rather than a male, were charged with misconduct . . . A careful examination of the plaintiff's pleadings fails to disclose any suggestion that her complaints . . . were intentionally mishandled because of either party's gender. Indeed, she acknowledges that she received a response from the university defendants as to every one of her complaints. While she did not get the responses she desired, and in some cases, the responses were delayed, there is nothing to support a claim of intentional discrimination ... .[91]

Although the Rowinsky decision limits school districts' exposure to actions for money damages, schools and colleges must continue to respond to all claims of student-to-student harassment in a fair and even-handed manner, consistent with the student code of conduct and local board policy. All claims should be investigated and documented, and appropriate discipline should be assigned when necessary.

IV. CONCLUSION

Given the ever-increasing sexual and litigious nature of our society, one would not expect litigation involving sexual abuse and harassment to wane. Most plaintiffs will probably continue to proceed under Section 1983 and Title IX, as tort immunity laws in many states preclude recovery against school districts and their employees under state law.[92] However, absent a finding of "deliberate indifference" by school district officials, the chances of recovery by a student against anyone other than the offending employee or student are remote, especially for student-to-student sexual harassment.

A student is somewhat more likely to be successful on a claim of alleged sexual abuse or harassment by school employees, because the courts recognize a limited constitutional duty for school districts to protect students from known sexual abuse perpetrated by its employees. However, even in that situation a student must prove that school district officials had knowledge of the inappropriate activities and demonstrated deliberate indifference to the violation of the student's rights. Proof of mere negligence or in-

adequate remedial action is insufficient for students to recover under Section 1983 or Title IX.

In cases of student-to-student sexual harassment, recent cases have held that no constitutional duty of protection exists under which a public school student can assert a claim under Section 1983. Only in very limited circumstances, such as the residential school setting, could such claims be successful under Section 1983. Student-to-student harassment is also unlikely to be actionable under Title IX, which requires a showing of intentional gender-based discrimination.

Despite the low likelihood of ultimate liability, however, school districts and school officials should actively work to avoid these difficult claims. Any allegations of sexual harassment or sexual abuse of a student in the school environment should be promptly investigated. If remedial action is warranted, school officials should take appropriate action in accordance with district policies and procedures, and should produce and retain written documentation regarding the situation. Prompt and sensitive handling of sexual harassment or sexual abuse allegations can help prevent costly and disruptive litigation.

ENDNOTES

[1] The definition of the phrase *color of state law* has been the subject of much litigation. *See, e.g.*, Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994) (en banc). The relevant issue is whether an official is acting pursuant to his or her duties as an employee of a state agency or political subdivision. *See also*, Becerra v. Asher, 921 F. Supp 1538 (S.D. Tex. 1996).

[2] Baker v. McCollan, 443 U.S. 137, 140-41 (1979); Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995).

[3] Doe v. Rains County Indep. Sch. Dist., 66 F.3d at 1406-07.

[4] *Id.*

[5] 436 U.S. 658 (1978).

[6] *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 477-78 (1986); Lopez v. Houston Indep. Sch. Dist., 817 F.2d 351, 353 (5th Cir. 1987).

[7] 491 U.S. 701, 735-37 (1989), *on remand*, 7 F.3d 1241 (5th Cir. 1993).

[8] Monell v. Department of Social Servs., 436 U.S. at 691-92; *see also* Spann v. Tyler Indep. Sch. Dist., 876 F.2d 437, 438-39 (5th Cir. 1989).

[9] *See generally* Collins v. City of Harker Heights, Texas, 503 U.S. 115, 120-21 (1992); Jett v. Dallas Indep. Sch. Dist., 7 F.3d 1241, 1245 (5th Cir. 1993).

[10] *See* Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 749 (5th Cir. 1993).

[11] 996 F.2d 745.

[12] 996 F.2d at 752; *see also* Kinsey v. Salado Indep. Sch. Dist., 950 F.2d 988, 995 (5th Cir. 1992) (en banc).

[13] *Id.* at 760 (emphasis added).

[14] *Id.* at 757; *accord* Gates v. Unified Sch. Dist. No. 449, 996 F.2d 1035 (10th Cir. 1993)

(holding that to prove a case against a school district, a plaintiff has to prove: (a) the existence of a continuing, persistent, and widespread practice of unconstitutional misconduct by the school district's employees; (b) deliberate indifference to, or tacit approval of, such misconduct by the school district's policy-making authorities (the school board) after notice to the officials of that particular misconduct; and, (c) injury by virtue of the unconstitutional acts pursuant to the board's custom, and that the custom was the moving force behind the unconstitutional acts). *See also,* Black v. Indiana Area Sch. Dist. 985 F.2d 707 (3d Cir. 1993); Thelma D. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991); Jane Doe A. v. Special Sch. Dist., 901 F.2d 642 (8th Cir. 1990).

[15] 489 U.S. 378 (1989).

[16] 934 F.2d 929.

[17] *Id.* at 935.

[18] 901 F.2d 642.

[19] 15 F.3d 443 (5th Cir.) (en banc), *cert. denied,* 115 S. Ct. 70 (1994).

[20] 15 F.3d at 452.

[21] 113 F.3d 1412 (5th Cir. 1997) (en banc).

[22] *See id.*

[23] *See* Doe v. Bridgeport Ind. Sch. Dist., 1996 WL 734949 (N.D. Tex. Dec. 11, 1996) (refusing to impose liability on offender's former school district for failure to investigate); Becerra v. Asher, 105 F.3d 1042 (5th Cir. 1995), *cert. denied,* 118 S. Ct. 82 (1997) (rejecting school district liability for assaults occurring away from school grounds and after student had withdrawn from school).

[24] 20 U.S.C. § 1681, et seq.

[25] 503 U.S. 60 (1992).

[26] *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S.Ct.1989 (1998).

[27] Title IX provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activities receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

[28] U.S. Const. Art. I, § 8, cl. 1.

[29] South Dakota v. Dole, 483 U.S. 203, 206-07 (1987); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17-18 (1981).

[30] Guardians Ass'n v. Civil Service Comm'n of New York, 463 U.S. 582, 596-98 (1983) (Title VI case).

[31] *Id.* at 597 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. at 29-30).

[32] *See, e.g.*, Legislative Report, U.S. Code Cong. & Admin. News p. 2426 (1972) (showing Congress was concerned about unequal admissions policies for women); *see also* Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) ("the statute's heart is a broad prohibition of gender-based discrimination in all programmatic aspects of an educational institution").

[33] *See* Cannon v. University of Chicago, 441 U.S. 677, 704 n.36 (1979) ("[a]ny college or university which has [a] policy which discriminates . . . is free to do so . . . but such institutions should not be asking the taxpayers of this country" to pay for it).

[34] *Id.* (emphasis added).

[35] 831 F. Supp. 867 (M.D. Ga. 1994).

[36] The federal regulations under Title IX are void of language that provides guidance in analyzing sexual harassment as sexual discrimination. The regulations instead concern institutional policies and practices affecting equality in athletics, admissions, and other activities. 34 C.F.R. § 106. The regulations require schools to adopt and publicize "grievance procedures providing for prompt and equitable resolution of student and employee complaints." 34 C.F.R. § 106.8. Rather than discuss harassment, the regulations contain minute details on how to operate an athletic program. *See* 34 C.F.R. § 106.41(c), et seq.

[37] 128 F.3d 1014 (7th Cir. 1997).

[38] *See* Gebser v. Lago Vista Indep. Sch. Dist.,118 S.Ct. (1998).
[39] *E.g.*, Howard v. Board of Educ., 876 F. Supp. 959, 974 n.10 (N.D. Ill. 1995); Seamons v. Snow, 864 F. Supp. 1111, 1117-18 (D. Utah 1994), *aff'd in part, rev'd in part,* 84 F.3d 1226 (10th Cir. 1996); Floyd v. Waiters, 831 F. Supp. at 876; *see also* Canutillo Indep. Sch. Dist. v. National Union Fire Ins. Co., 900 F. Supp. 844, 847 (W.D. Tex. 1995)
[40] 876 F. Supp. at 974; *accord* Seamons, 864 F. Supp. at 1117-18 (noting that Title IX does not create a hostile environment claim based on negligence of the school district); *see also* Cannon, 441 U.S. at 704 n.36 (discussing legislative history showing that the statute is aimed at discriminatory "policies" and observing that Congress "wanted to avoid the use of federal resources to support discriminatory practices").
[41] *See* Lago Vista, 118 S.Ct. 1989 (1998).
[42] Doe v. Petaiuma City Sch. Dist., 830 F. Supp. 1560, 1757 (N.D. Cal. 1993); Lago Vista, 1998 118 S.Ct. 1989 (1998).
[43] *Id.*
[44] 831 F. Supp. at 876.
[45] 106 F.3d 648 (5th Cir. 1997).
[46] *See id.*
[47] 830 F. Supp. at 1576.
[48] *Compare* Smith v. Metropolitan Sch. Dist., 128 F.3d 104 (7th Cir. 1997) (utilizing intentional conduct standard), *with* Oona R-S v. McCaffrey, 122 F.3d 1707 (9th Cir. 1997) (utilizing standard of negligent conduct),*and* Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947 (W.D. Tex. 1995), *rev'd,* 101 F.3d 393 (5th Cir. 1996) (using strict liability standard).
[49] *See* Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct.1989, (1998).
[50] 42 U.S.C. § 2000e, et seq.
[51] The Supreme Court has acknowledged that Title IX is patterned after Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) and must be construed in a similar fashion. Cannon, 441 U.S. at 694-96. In accordance with this reasoning, courts have refused to employ Title VII principles. *See, e.g.*, Howard v. Board of Educ., 876 F. Supp. at 974 n.10; Seamons v. Snow, 864 F. Supp. at 1118; R.L.R. v. Prague Pub. Sch. Dist., 838 F. Supp. at 1534; *see also* Mennone v. Gordon, 889 F. Supp. 53, 57 (D. Conn. 1995) (concluding that there are "major differences" between Title VII and Title IX); Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 142 (W.D. Tex. 1995) ("no doubt . . . that in the Fifth Circuit, Title IX is to be analyzed under principles from Title VI"); Bougher v. University of Pittsburgh, 713 F. Supp. 139, 145 (W.D. Pa.) (refusing to "transfer wholesale" EEOC guidelines into an area for which they were not drafted), *aff'd on other grounds,* 882 F.2d 74 (3d Cir. 1989).
[52] 42 U.S.C. § 2000e(b); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).
[53] 20 U.S.C. § 1681(a).
[54] Comparing the two statutes, and noting the absence of agency provisions in the definitions in Title IX, the courts in both Howard and Floyd held common law agency principles do not apply to claims under Title IX. Howard v. Board of Educ., 876 F. Supp. at 974; Floyd v. Waiters, 831 F. Supp. at 876; *accord* Slaughter v. Waubonsee Comm. College, 1995 WL 579296 (N.D. Ill. Sept. 29, 1995) (not reported); R.L.R. v. Prague Pub. Sch. Dist., 838 F. Supp. at 1534; Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977) ("the concept of mere respondeat superior appears ill-adapted to the question of Title IX sex discrimination based on harassment incidents"), *aff'd,* 631 F.2d 178 (2d Cir. 1980).
[55] 42 U.S.C. § 1981a(b)(3).
[56] Tex. Civ. Prac. & Rem. Code §§ 16.001(a)(1), 16.003.
[57] 29 C.F.R. §§ 1600.735-101 through 1608.12.
[58] *See* Lipsett v. University of Puerto Rico, 864 F.2d. 881, 901 (1st Cir. 1988) ("in implying a cause of action under Title IX, the Supreme Court has considered only actions against educational institutions . . . accordingly, the separate liability of the supervisory officials must be established, if at all, under § 1983, rather than under Title

IX"); Clay v. Board of Trustees of Neosho County Comm. College, 905 F. Supp. 1488, 1495-96 (D. Kan. 1995); (not reported); Bowers v. Baylor Univ., 862 F. Supp. 142, 1455-46 (W.D. Tex. 1994); Seamons v. Snow, 864 F. Supp. at 1116; Doe v. Petaluma City Sch. Dist., 830 F. Supp. at 1576; Bougher v. University of Pittsburgh, 713 F. Supp. 139, 143 (W.D. Pa.), *aff'd on other grounds*, 882 F.2d 274 (3d Cir. 1989); Garza v. Galena Park ISD, 914 F. SUPP. 1437 (S.D. Tex. 1994).

[59] 830 F. Supp. at 1576-77.

[60] *Id.* at 1577.

[61] *See id.*

[62] *See* Smith v. Metropolitan Sch. Dist., 128 F.3d 1014 (7th Cir. 1997).

[63] Monell v. Department of Social Servs., 436 U.S. at 691; 42 U.S.C. § 1983.

[64] *See generally* Collins v. City of Harker Heights, Texas, 503 U.S. at 120-21.

[65] *See* Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d at 749.

[66] Jojola v. Chavez, 55 F.3d 488, 492 (10th Cir. 1995).

[67] *See, e.g.*, Woodward v. City of Worland, 977 F.2d 1392, 1397-1401 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 3038 (1993) (rejecting an equal protection claim premised on sexual harassment among co-workers because the wrongdoers did not use state-conferred authority to harm the complainants).

[68] *See, e.g.*, Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993); D.R. v. Middlebucks Area Vocational Sch., 972 F.2d 1364, 1369 (3d Cir.) (en banc), *cert. denied*, 506 U.S. 1079 (1993); Hunter v. Carbondale Area Sch. Dist., 829 F. Supp. 714, 717-18 (M.D. Pa.), *aff'd*, 5 F.3d 1489 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 903 (1994); Russell v. Fannin County Sch. Dist., 784 F. Supp. 1576, 1580 (N.D. Ga. 1992), *aff'd*, 981 F.2d 1263 (11th Cir. 1992); Elliott v. New Miami Bd. of Educ., 799 F. Supp. 818, 820 (S.D. Ohio 1992).

[69] DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1988).

[70] *See also* Davidson v. Cannon, 474 U.S. 344 (1986) (dismissing lawsuit against prison officials for allegedly failing to protect inmate from violent attack by fellow prisoner despite receiving warning about possible attack).

[71] 38 F.3d 198, 201-02 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995).

[72] 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc).

[73] 489 U.S. at 199. The fact that children are less able than adults to protect themselves also is irrelevant: "Neither the state compulsory attendance law nor any other state rule required their attendance on the Claypoole school bus. Their parents, their primary caretakers, were free to arrange any other form of alternate transportation or escort them to school personally . . . we acknowledge, as plaintiffs stress, that school children may be reluctant to seek help in situations of this kind . . . but these concerns are products of the age and circumstances of children; they do not emanate from any state imposed restraint." Black v. Indiana Area Sch. Dist., 985 F.2d at 714 (emphasis added); *see also* Dorothy J. v. Little Rock Sch. Dist., 7 F.3d at 732 (student's mental retardation did not constitute a state- imposed restraint on freedom to act).

[74] 44 F.3d at 1305.

[75] *See, e.g.*, Jojola v. Chavez, 55 F.3d at 491-92; D.R. v. Middlebucks Area Vocational Technical Sch., 972 F.2d at 1369; J.O. v. Alton Community Unit Sch. Dist., 909 F.2d 267, 271-72 (7th Cir. 1990); Maldonado v. Josey, 975 F.2d 727, 729-30 (10th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d at 732; *cf.* Tucker v. Callahan, 867 F.2d 909, 913 (6th Cir. 1989) (finding no § 1983 liability where on-duty police officer watched as the plaintiff was severely beaten by third party in a parking lot); McKee v. City of Rockwall, 877 F.2d 409, 415-16 (5th Cir. 1989) (refusing to hold city liable for injuries sustained by the plaintiff after the police refused to arrest her boyfriend in response to her call for help), *cert. denied*, 493 U.S. 1023 (1990).

[76] 22 F.3d 991 (10th Cir. 1994).

[77] *Id.* at 994.

[78] 15 F.3d 443 (5th Cir.) (en banc), *cert. denied*, 115 S. Ct. 70 (1994).

[79] 15 F.3d at 452.

[80] 503 U.S. 60 (1992).
[81] 80 F.3d 1006 (5th Cir. 1996).
[82] *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc).
[83] *See id.* at 1401.
[84] *See id.* at 1404.
[85] 917 F.2d 779, 785 (3d Cir. 1990).
[86] 864 F. Supp. 1111, 1118, *aff'd in part, rev'd in part*, 84 F.3d 1226 (10th Cir. 1996).
[87] *Id.*
[88] 35 F.3d 709 (2d Cir. 1994).
[89] *Id.* at 715.
[90] 816 F. Supp. 1326 (E.D. Wis. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994).
[91] *Id.* at 1331.
[92] Many states are governed by the doctrine of governmental or sovereign immunity, which protects public entities and their employees from liability in negligence suits. A good example of a system of sovereign or governmental immunity exists in Texas. The doctrine of sovereign immunity has been a part of Texas jurisprudence for approximately 160 years. *See, e.g.*, Braun v. Trustees of Victoria Indep. Sch. Dist., 114 S.W.2d 947 (Tex. Civ. App._ San Antonio 1938, writ ref'd); Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617 (Tex. 1987). This doctrine has been abrogated only slightly through the passage of the Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code § 101.001, et. seq. Under the Texas Tort Claims Act, school districts and junior colleges generally retain their common law immunity, with the only exceptions relating to the negligent use or operation of motor vehicles by their employees. In addition, school employees are entitled to official immunity under Texas common law and section 22.051(a) of the Texas Education Code. *See, e.g.*, Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978); Hopkins v. Spring Indep. Sch. Dist., *supra*.